The
Ceylon Law Weekly

containing cases decided by the Court of Criminal Appeal, the Supreme Court of Ceylon, and Her Majesty the Queen in the Privy Council on appeal from the Supreme Court of Ceylon and foreign judgments of local interest.

with a Section in Sinhala

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WIHT A DIGEST

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DIGEST

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Administration of Estates—Application by administrator to sell land to recover testamentary expenses—Intervention by third parties claiming unencumbered title—Has the Court jurisdiction to determine disputes as to title in such proceedings.

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Per BERTRAM, C.J. :—" It is a great pity, I think that Judges, when they see two sides fencing with one another and manoeuvring for position should conceive themselves merely as umpires in a game of strategy and should not themselves determine that the truth must be ascertained and themselves call witnesses who for strategic reasons or through misconception are withheld by either party ".

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The petitioner sought to appeal to the Supreme Court from a judgment of the District Court but failed to comply with Rule 2 (1) of the Civil Appellate Rules. His appeal was thereafter rejected by the Supreme Court, having been deemed to have abated by the operation of Rule 4. He thereafter made the present application for leave to appeal to the Privy Council.

Held : (1) That no application lay in such a case inasmuch as the appeal to the Supreme Court must be deemed to have abated by operation of law and there was thus no appeal before it.

(2) That when the Supreme Court made a formal order rejecting the appeal it merely gave expression to the fact that there was no appeal pending before it and such a formal order was not a " judgment " or " order " within the meaning of section 2 of the Appeals (Privy Council) Ordinance.

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(2) That in a case of conspiracy where the part played by each accused is inextricably interwoven with the part played by the rest, bail should not be granted in respect of one of them though some of the grounds urged against the others are not present in his case.

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Held : That as the plaintiff had not proved any special circumstances in terms of section 49 (12) (*a*) of the Bills of Exchange Ordinance, notice of dishonour should have been given or sent off in time to reach the 1st defendant on 7th December, 1960, and as the plaintiff had failed to give due notice of dishonour to the 1st defendant, the plaintiff's action should be dismissed.

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(2) That where items of evidence which by themselves would give rise to inferences adverse to the accused are placed before the jury, it is a misdirection to fail to point out connected items of evidence which are in his favour.

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Criminal trial before jury—Burden of proof—Cumulative effect of many suspicious circumstances proved against accused—Whether any burden cast on accused thereby—Misdirection.

In the trial of an accused for a criminal offence before a jury, the learned Judge directed the jury as follows :—

> "I told you that I agree with counsel for the defence that the accused is presumed to be innocent. It is for the prosecution to establish his guilt. The accused does not have to give evidence. He need not even call evidence, but at the same time I must tell you, if you are satisfied that there are many suspicious circumstances proved against the accused and those suspicious circumstances when taken together, that is, taken cumulatively, make up a sort of strong case against the accused and if you believe that if he is innocent of the offence it is in his power to offer an explanation of those suspicious circumstances and he refuses to explain those suspicious circumstances, it is a reasonable and justifiable conclusion that he is refraining from explaining those circumstances because those circumstances cannot be explained."

Held : (1) That the learned judge's direction was wrong and that suspicious circumstances did not establish guilt ; nor did they relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt, or compel the accused to give or call evidence.

(2) That as it could not be said that the Jury was not influenced by this passage, the conviction of the accused should be quashed.

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The appellants, who were the 2nd, 4th and 5th accused, were jointly tried with two others—the 1st and the 3rd —on charges of : (*a*) being members of an unlawful assembly, the common object of which was to commit house-breaking and robbery ; (*b*) using violence in prosecution of the said common object ; (*c*) committing house-breaking and robbery in prosecution of the said common objects, offences punishable under sections 140, 144 and 443 and 380 read with section 146 of the Penal Code.

The occupants of the house in question on the day of the offence were four persons, viz., T., W. (*T.'s* son), *M.* (*T.'s* mistress) and *S.*, their servant. After the evidence of *T.*, the 1st witness, who implicated among others the 1st, 4th and 5th accused, Crown Counsel applied to withdraw the indictment against the 1st accused, on the ground that the other evidence he had would not take the case against the 1st accused any further. This application was allowed and the 1st accused was discharged.

T., in his evidence also stated : (*a*) that the 5th accused, who was a stranger then and whom he identified later at a parade, went up with a knife upraised to stab *W.* ; (*b*) that he identified the 4th accused as one of the robbers at the parade. He assigned no specific act to the 4th accused.

W., being called, stated in examination-in-chief : (*a*) that among the robbers who entered the house were the 4th accused, who gave him a blow on the back of the left shoulder ; (*b*) that the 5th accused tried to stab him ; (*c*) that he had not seen either of them before, but later identified them at a parade. In cross-examination he supported the evidence against the 1st accused.

S., giving evidence implicating the 2nd accused stated : (*a*) that he knew the 2nd accused for about four to five years ; (*b*) that he told witness, Aron, all that the 2nd accused did that night (which was confirmed by the statement made by Aron to the Police).

After witness, Aron, gave evidence, Crown Counsel informed Court that the only other evidence he proposed to call was the evidence of certain Police Officers. At this stage there being no evidence against the 3rd accused and upon a direction by the trial Judge, the jury brought in a verdict of not guilty against the 3rd accused and he was acquitted.

The trial then proceeded against the 2nd, 4th and 5th accused and the further evidence led at the trial was as follows :—

(*a*) that the 4th and 5th accused were arrested by the Police ; (*b*) that their arrest was not in consequence of any information given by the inmates of the house ; (*c*) that an identification parade was held in the Magistrate's Court on 19.10.59, by Police Sergeant Edirisinghe, on the orders of the Magistrate ; (*d*) that 4th and 5th accused were lined up in the parade along with twelve others ; (*e*) that Sergeant Edirisinghe requested *T.* and *W.* (witnesses) as each of them was brought into Court to point out the person or persons, who came on the night of the offence and committed robbery and used force on them and that each of them pointed out the 4th and 5th accused.

Evidence was also elicited by the defence in cross-examination in support of its suggestion that prior to the identification parade the two witnesses had either been shown the 4th and 5th accused, or been given such particulars relating to them as would have facilitated their identification at the parade.

Thus the case for the 4th and 5th accused rested entirely on the fact that they were identified at the parade by *T.* and *W.* and on the evidence testifying to that fact given at the trial by them and Sergeant Edirisinghe.

It was contended in appeal : (*a*) For the 4th and 5th accused that the verdict of the jury was unreasonable and could not be supported by the evidence for the reasons that : (i) the jury should not have acted on the evidence of *T.* and *W.*, because when Crown Counsel moved to withdraw the indictment against the 1st accused, the Crown virtually conceded that these two witnesses were not worthy of credit in regard to their evidence implicating the 1st accused ; (ii) that the identification parade held as aforesaid was not properly conducted ; (iii) that the evidence of *T.* and *W.* at the trial testifying thereto was not satisfactory ; and (iv) that the evidence of Sergeant Edirisinghe was not admissible to corroborate the evidence of identification. (*b*) For the 2nd and 5th that the trial was vitiated by certain irregularities and illegalities connected with the inspection of the scene and other places by the jury in the presence of the Judge and Counsel after all the evidence led for the prosecution and the defence was concluded. These irregularities and illegalities consisted of questions to witnesses who pointed out details of places and objects referred to in their evidence in Court and answered on affirmation by Court, both with regard to the commission of the offence and the identification parade.

Held : (1) That inasmuch as in moving to withdraw the indictment against the 1st accused the Crown had virtually conceded that witnesses *T.* and *W.* were unworthy of credit in regard to their evidence implicating the 1st accused, their evidence against the other accused should not be accepted as true unless there is some compelling reason for doing so.

(2) That in this case the most that can be urged for accepting the evidence of the said two witnesses implicating the 4th and 5th accused is that each of them in turn picked out these two accused from among those lined up in the identification parade as two of the robbers ; but the evidence of Sergeant Edirisinghe to this effect, though relevant under section 9 of the Evidence Ordinance does not go very far in showing the truth of the evidence of these two witnesses, as neither of them was able to give the Police a description of the robbers, which tallied in any way with the 4th and 5th accused and as their evidence was contradictory as to what these two accused did at the scene of the robbery.

(3) That the evidence of Sergeant Edirisinghe was not admissible under section 157 of the Evidence Ordinance to corroborate the statement made by the two witnesses, *T.* and *W.* at the identification parade, inasmuch as he was not an " authority legally competent to investigate the fact " of the identity of the 4th and 5th accused as persons concerned in the commission of the offences within the meaning of that section. The sergeant held the identification parade on the orders of the Magistrate, who had no power to delegate his duties.

(4) That even if such statements were admissible under section 157 of the Evidence Ordinance, they were not corroboration in the true sense of the term, for corroboration must be extraneous to the witness who is to be corroborated.

(5) That consequently, the verdict of the jury in convicting the 4th and 5th accused on the evidence of witnesses *T.* and *W.* was unreasonable.

On the submission on behalf of the 2nd and 5th accused that the trial was vitiated by certain irregularities and illegalities connected with the inspection of the scene and other places as aforesaid, the majority of the Court, after considering the scope of section 238 of the Criminal Procedure Code and the decisions thereon—

Held : (BASNAYAKE, C.J., dissenting) :

(6) That there could be no legal objection to the jury having been shown the various places, objects and matters to which their attention was specially directed in the course of the inspection and which are set out in the judgment. The only irregularity of which any notice may be taken is that the questions put to the witnesses and the replies they gave took the form of evidence recorded at the inspection, instead of the witnesses being recalled in Court after the inspection and their evidence recorded as to what took place at the inspection.

(7) That this irregularity was not sufficient to vitiate the trial or to result in material prejudice to the 2nd accused, as most of the evidence recorded at the scene was in respect of matters which had already been deposed to by the witnesses concerned, when they gave evidence earlier in Court.

In view of the importance of the questions of law involved in this case His Lordship the Chief Justice delivered a separate judgment discussing in particular the question of the scene of offence being viewed by the jury—on which question he dissented from the majority of the Court. The facts and the law on this question as set out in His Lordship's judgment may be summarised as follows :—

After the case for the prosecution and the defence had been closed the Commissioner of Assize, the Jury, Counsel, the witnesses, the accused and the Court staff visited the house of witness *T.*, where the offences afores id were committed. There the learned Commissioner first examined on oath several witnesses including the aforesaid *T.*, *W.* and *S.*, and then recalled and questioned them at different places he visited on that occasion. The minutes of the transcript did not show where the jury were while the Commissioner was moving from place to place and whether they were in a body under the care of an officer of the Court, while the witnesses were being examined by the Commissioner at the different places. There was nothing to indicate that what was said by the witnesses examined by the Commissioner was heard by each and everyone of the jurors.

His Lordship after discussing such questions as : Does a view of the scene of offence form part of a trial ? C n a Judge test the veracity of witnesses by directing demonstrations, experiments and explanations of witnesses at the scene ? Legality of a Judge of the Supreme Court holding Criminal Sessions at a place other than a public place appointed for the purpose and the effect of sections 53 and 85 of the Courts Ordinance, section 429 of the Criminal Procedure Code and section 165 of the Evidence Ordinance, expressed his views as follows:—

(1) That the procedure adopted by the learned Commissioner was not authorised by section 238 of the Criminal Procedure Code. By examining witnesses and taking evidence, as if he were holding a sitting of the Court, he acted illegally.

(2) That the provision in section 238 (1) of the Criminal Procedure Code, that " the Judge shall make an order " that the Jury should view the scene of offence, contemplates a formal order by the Judge giving the reasons for it and not a bare minute or record. It is an imperative provision. So is the requirement therein to appoint an officer of the Court under whose care the Jury has to be conducted to view the scene.

(3) That a view ordered under section 238 is not a part of the trial for the reason that the persons whose attendance is essential to a trial such as the Judge, the accused and the respective counsel are not required to be present, nor is it a " stage of an inquiry, trial or other proceeding " within the meaning of section 429 of the Criminal Procedure Code.

(4) That testing the truth of evidence given at a trial by directing demonstrations, experiments and tests is not authorised by the Evidence Ordinance or any Statute. A judge should guard himself against appearing to assume the role of an investigator.

(5) That evidence contemplated in section 231 of the Criminal Procedure Code is the evidence referred to in succeeding sections 232, 234, 235, 236 and 237 thereof and also section 5 of the Evidence Ordinance.

(6) That evidence of experiments may not be given except by experts when they are conducted by them for the purpose of supporting or explaining their opinions which are declared to be relevant by section 45 of the Evidence Ordinance.

(7) That even section 165 of the Evidence Ordinance and section 429 of the Criminal Procedure Code afford no authority for examining or re-examining witnesses at view of the scene.

(8) That in any event, testing the veracity of a witness is not obtaining proper proof of relevant facts or discovering relevant facts within the meaning of section 165 of the Evidence Ordinance.

(9) That a Judge of the Supreme Court holding Criminal Sessions of the Supreme Court may hold such sessions only in a public building appointed for the purpose, which all persons have a right to enter.

(10) That when evidence is recorded after the defence is closed, the accused is at a disadvantage when the further evidence taken touches aspects of the case which they were not called upon to meet when they entered on their defence. Consequently a view of the scene should not be ordered at a stage when it would not be in the interests of justice so to do.

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Sections 151 (2) *and* 187 (1)—*Accused present otherwise than on summons or warrant—Inquiry by Magistrate prior to framing of charge—Police Officer who produced accused not examined—Meaning of word "forthwith" in section* 151 (2).

Where an accused appears before a Magistrate otherwise than on summons or warrant, and it, therefore, becomes incumbent on the Magistrate under section 187 (1) of the Criminal Procedure Code to conduct the examination directed by section 151 (2) of the Code—

Held : (1) That there is no imperative provision of law requiring the Magistrate to examine the Police Officer himself who produces the accused.

(2) That "forthwith" in section 151 (2) does not mean that the examination should be conducted on the first day on which the accused is brought before Court. In any event, in the present case there had only been at the most an omission or irregularity which had not occasioned a failure of justice.

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Sections 151 (2) *and* 187 (1)—*Meaning of the word "forthwith" in section* 151 (2)—*Delay in recording evidence of person producing accused before Magistrate—Contravention of section* 151 (2) *read with section* 187 (1)—*Effect of such delay.*

Held : (1) That section 151 (2) of the Criminal Procedure Code requires that the Court should record the evidence of the person producing the accused, forthwith, *i.e.*, at the time the person so producing the accused actually states to the Magistrate that he is producing the accused.

(2) That where there was a delay of four days between the production and the examination of the person who produced the accused, all subsequent proceedings should be quashed.

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Held : That where an accused has not been initially produced before a Magistrate, either by way of summons or warrant, the subsequent serving of summons in the course of proceedings does not do away with the necessity of recording evidence before framing a charge as required by sections 151 (2) and 187 (1) of the Criminal Procedure Code.

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Held : That there is no provision corresponding to section 148 (1) (*b*) of the Criminal Procedure Code in respect of private plaints. Hence it is not permissible for a Magistrate to charge an accused from an amended private plaint even though the offence is punishable with imprisonment for not more than three months.

Per SRI SKANDA RAJAH.—"This is a private case and it is common knowledge that private cases are treated by Magistrates on a different footing from police cases, though there is no provision in the Criminal Procedure Code to make any such distinction. I wish again to stress that Magistrates should not make this distinction between private plaints and police plaints. The failure to dispose of private

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One Ismail Abdulla Gulab owned a house in Aden in which he lived with his wife. Gulab and his wife brought up from childhood a sister of the wife, one Kulsum Bint Abdul Khaleq. Kulsum lived with Gulab and his wife in this house. The personal law of the parties was the Mohammedan Law. On the 19th August, 1957, Gulab executed a document in the form of a deed of sale which recited that Kulsum had agreed to buy the house for 25,000 Aden shillings. It also recited that Gulab as seller received this sum and transferred the land to Kulsum as buyer. The deed further recited that " the seller hereby gives possession of the aforesaid property to the buyer ". Gulab died on 10th August, 1959.

The appellants, who were heirs according to Mohammedan Law, of Gulab, sought a declaration that the conveyance of the 19th August, 1957, was void and should be delivered up for cancellation and that the property be declared to be part of Gulab's estate. This was based on an allegation that the transfer was " a sham and bogus transfer ", that it was, in fact, a donation by Gulab to Kulsum, and that as possession had not been given by the donor to the donee, the donation was not valid in law. The appellants also contended that the deed of sale could not be treated as a deed of gift because the document recited a consideration.

It was found as a fact that no financial consideration had passed from Kulsum to Gulab, and that the alleged price was much below the normal value of the house.

Held : (1) That notwithstanding that the deed purported to be a sale and that the consideration was recited, it was, on the evidence, a gift and not a sale, the question being regarded purely as one of intention ; that the fact that the sum mentioned as consideration was far short of the actual value of the property and the fact that it was not paid at all went to show that the transaction was not a sale, but a gift with an imaginary consideration inserted " *in a manner common in such transactions in India* ".

(2) That, in the case of donation, where both the donor and the donee reside in the same house at the time of the gift, no departure from the property by the donor is necessary in order to give possession to the donee ; that it was sufficient that an intention on the part of the donor to transfer possession should have been unequivocally manifested.

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Divorce

Divorce—Constructive malicious desertion—When is it a ground for divorce ?—Order for permanent alimony—At what stage should it be made ?—Civil Procedure Code, section 615.

Held : (1) That where each party alleges that the other is the deserter, it is necessary to ascertain who is substantially responsible for the desertion in law. It does not matter which of the parties actually goes away from the matrimonial home. The party who really deserts is the one who compels the desertion.

(2) That the matter of permanent alimony should be considered only when the Court comes to enter decree absolute and not when ordering *decree nisi* for divorce.

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Held : (1) That the legal position of Indian labourers employed in tea or rubber estates in Ceylon, who are in such capacity given occupation of rooms in the cooly-lines belonging to the estate, is that one can imply a condition that although they can be ejected from the line-rooms they occupy once their contract of labour is terminated, they can be only so ejected after reasonable notice.

(2) That a period of, at least, three months' notice would be reasonable in their case.

Equity

Jurisdiction of Courts to grant equitable relief against forfeiture.

Estate Labour (Indian) Ordinance

Estate Labour (Indian) Ordinance, (Cap. 133), section 23—Does it apply to persons born in Ceylon and who are descendants of actual emigrants from India ?—Can Superintendent of an estate lawfully terminate the services of the spouse of an employee, whose employment has been terminated by the employer ?

Held : That section 23 of the Estate Labour (Indian) Ordinance, (Cap. 133) applies to persons born in Ceylon, who are commonly known as "Indian estate labourers". Therefore, it is lawful for an employer to terminate the services of the spouse of an employee who quits his employment, even when the employee quits in consequence of the termination of the employment by the *employer.*

Evidence

Evidence—Police Officer conducting raid without search warrant or even making preliminary entry in notebook—Admissibility of such Police officer's evidence—Magistrate rejecting defence witness' evidence —What matters should he consider before doing so.

Held : (1) That when a Police Officer has conducted a raid without either having a search warrant or even making a preliminary entry in his notebook the evidence of such Officer, though admissible, should be considered with circumspection.

(2) That before a Magistrate rejects the evidence of a witness there must be material elicited by cross-examination or otherwise, together with questions of the witness' demeanour.

Evidence—Certified copy—Statement of Tamil person recorded in Information Book in Sinhala—Statement certified by Tamil sergeant who could not read Sinhala—Validity—Accused charged with several offences—Conviction on some charges—Is it open to a Magistrate to warn and discharge the accused on the remaining charges—Criminal Procedure Code, section 325 (1).

Held : (1) That a copy of a statement alleged to have been certified by a person who is not competent to read the language in which it was recorded is not a certified copy.

(2) That it is not open to a Magistrate who convicts an accused person on some counts in the charge to deal with him under section 325 (1) of the Criminal Procedure Code in respect of the remaining charges against him.

Evidence Ordinance

Court of Criminal Appeal—Misdirection—Corroboration of witness by his own former statements—Evidence Ordinance, section 157—Effect of section.

The two accused were indicted on a charge of voluntarily causing grievous hurt to one Sinniah by means of a knife and found guilty and convicted. The case against the accused rested entirely on the evidence of the injured man, Sinniah.

The learned Judge directed the jury that Sinniah was an unsatisfactory witness and that if his evidence stood by itself they should not act on it. He directed them, however, that they could regard the evidence given by witnesses, A, B and C as corroborating Sinniah's evidence. A, B and C merely said that Sinniah told them that the accused had cut him with a knife.

Held : That this was a misdirection on a question of law. The evidence given by A, B and C merely corroborated Sinniah's testimony in Court. Section 157 of the Evidence Ordinance makes relevant a previous statement of a witness which is consistent with the testimony which he gives in Court. That section is no authority for the proposition that a consistent witness is necessarily a true witness and should be believed. The learned Judge was, therefore, wrong in directing that although Sinniah by himself was a witness unworthy of credit, his evidence could be acted upon because he had told A, B and C that the accused cut him with a knife.

The learned Judge further directed the Jury that Sinniah's evidence was corroborated by the discovery of a blood-stained sarong in the room which the first accused shared with other persons, and by the discovery of another blood-stained sarong in the room of the second accused.

Held : That as there was no evidence that the sarong in the room which the first accused shared with others was his sarong and that as there was no evidence that the sarong in the room of the second accused was his property or that the blood stains on that sarong were that of Sinniah, there was a misdirection on a question of fact, and that the misdirections were such as to render the verdict a wrong one.

Sections 68, 69—Partition Act, section 69—Partition action—Deed adduced in proof of the title impeached as being a forgery—Attesting witnesses and notary dead—How should such deed be proved ?

Deed—Admission of, as evidence without proper proof—No objection taken though genuineness impeached—Can Court act on such evidence ?

Held : (1) That as the genuineness of the deed in question had been impeached, it should have been formally proved in the manner prescribed by the Evidence Ordinance. As both attesting witnesses were dead, there should have been evidence that the attestation of, at least, one attesting witness was in his handwriting and that the signature of the person executing it was in such person's handwriting.

(2) That section 69 of the Partition Act does not apply to cases in which the genuineness of a deed is impeached or the Court requires its proof.

(3) That even though no objection was taken to the document when its contents were first spoken to by a witness, it should not have been used as evidence and acted upon by the Court. A Court cannot act on facts which are not proved in the manner prescribed in the Evidence Ordinance.

PERERA AND OTHERS *v.* ELISAHAMY 59

Sections 32 (5) *and* 110.

See under—" REI VINDICATIO " 74

Sections 5, 45, 155, 165 *and* 157.

See under—COURT OF CRIMINAL APPEAL DECISIONS .. 9

Exceptio Rei Venditae et Traditae

See under—" REI VINDICATIO " 74

Excess Profits Duty Ordinance

Excess Profits Duty Ordinance, No. 38 *of* 1941, *section* 2—*Profits arising from any business*—*Section* 4—*Gratuities paid to employees by employer on cessation of business*—*Whether deductible in ascertaining profits or income*—*Whether payments of a capital nature under section* 10 (*c*) *of the Income Tax Ordinance, (Cap.* 188, *Legislative Enactments,* 1938)—*Whether paid on a cessation of business, or for the purpose of carrying on the business.*

The appellant was carrying on the business of the running of tramcars in Colombo, and that of contractors and suppliers of electric current for lighting. Between 1927 and 1928, the business of supplying electric current was taken over by the Government, and on the 31st August, 1944, the activity of running electric tramcars was acquired by the Municipal Council of Colombo. After the latter acquisition by the Municipal Council, the appellant paid those who were its employees in the activity of running electric tramcars a sum of Rs. 188,946/- as gratuity. The right to deduct this sum in ascertaining the profits from the business of the appellant for the purposes of the Excess Profits Duty Ordinance, No. 38 of 1941, was disputed on the following grounds :—

(*a*) That the sum of Rs. 188,946/- was paid by the appellant to the employees in the tramcar service because there was a cessation of business, and was not paid for the purpose of carrying on that business.

(*b*) That the sums of Rs. 107,986/-, Rs. 43,755/- and Rs. 3,185/- paid by the appellant were voluntary payments made to the employees, and that no liability to pay them was incurred by the assessee until the date of payment. As these three sums were paid after the assessee had ceased to carry on business of running tramcars they were outgoings of a capital nature.

Under section 4 of the Excess Profits Duty Ordinance, the profits arising from any business to which the Ordinance applied were to be determined in the manner and on the same principles as they would be determined for the purposes of income tax.

Held : (1) That the payments were deductible, and did not constitute expenditure of a capital nature under section 10 (*c*) of the Income Tax Ordinance, (Cap. 188, Legislative Enactments, 1938).

(2) That the fact that the appellant paid gratuities on retirement must undoubtedly have been a matter which the appellant's employees took into consideration in entering into the Company's service on the salaries they were offered. And that the fact that the gratuities were paid on the cessation of the activity made no difference.

COLOMBO ELECTRIC TRAMWAYS & LIGHTING CO., LTD. *v.* COMMISSIONER OF INLAND REVENUE .. 57

Executive Power

Executive Power in Ceylon is exercised by the Governor-General on behalf of Her Majesty in accordance with the laws of Ceylon.

See under—PRIVY COUNCIL 2

See also under—PRIVY COUNCIL 41

Fideicommissum

Deed of gift creating a " fideicommissum "—Gift in favour of particular members of a family—Not accepted by the " fideicommissaries "—Revocability by donor.

Where a deed of donation creates a *fideicommissum* in favour of particular members of a family, as distinguished from a *fideicommissum* in favour of family as a class, and the donation is accepted by the *fiduciaries*, but not by the *fideicommissaries*, it is open to the donor to revoke the gift so far as it relates to the *fideicommissaries* and their children.

CHARLESHAMY *v.* CARLINA AND OTHERS .. 21

Fideicommissum—Sinhala deed—Use of the words " urumakkara polmakh athmistrassi bharakaradin "—Whether to be translated as " heirs, executors, administrators and assigns "—Meaning to be given to the word " භාරකාර "—Validity of the fideicommissum.

A claim was made that the words in the following clause in a deed (as translated from Sinhala) created a *fideicommissum* :—

" Therefore, we, the said Donors hereby gave full power into the said Donees, Kalinga Thamis Nona and Dinayadura Abaran Silva, to hold and possess subject to the aforesaid regulations the said undivided portion of land and all the rights, title, interest and privileges of us the said Donors in and to the same, and after their lifetime their heirs, executors, administrators and assigns to

hold and possess subject to the Government regulations the same uninterruptedly for ever or to deal with the same as please."

Held : (1) That the words used are not sufficient to create a *fideicommissum.*

(2) That the word "*bharakara*" should not be given its literal meaning, "Trustee, bailee, consignee, custodian, warden" as the Supreme Court had for over fifty years recognised it as equivalent to the English word "assigns" in accordance with a previous notarial practice.

Per H. N. G. FERNANDO, J.—"The acceptance at the present-day of a different construction would result in the condemnation of titles long regarded as valid and settled. Moreover, the opinion of de Sampayo, J., *related to a notarial practice* which to his knowledge *prevailed during a period prior to* 1914, and there is not, nor is there likely to be, available material on which we can *now* hold that the learned Judge formed an incorrect opinion upon on what was for him a past or a contemporary practice of notaries. It is significant also that the opinion was expressed with full knowledge of the correct meaning of the Sinhala word".

SILVA *v.* SENAHAMY AND OTHERS 106

Horse Racing—Control of Publication Act, No. 44 of 1961

Control of Publication on Horse Racing Act, No. 44 *of* 1961—*Charge under section* 2 (*c*)—*Ingredients to be proved.*

Held : (1) That to establish a charge under section 2 (*c*) of the Control of Publication on Horse Racing Act, No. 44 of 1961, the prosecution must prove : (*a*) that the accused distributed, sold or offered for sale a printed article ; (*b*) that the article in question was printed, published or communicated in breach of section 2 (1) or that it was imported in contravention of section 2 (*b*).

(2) That a publication or communication under section 2 (*a*) should be proved independently of the sale or distribution of the printed article to the decoy by the accused. Otherwise the accused should have been charged under section 2 (*a*).

SALAHUDEEN *v.* INSPECTOR OF POLICE, FORT .. 19

Identification

Identification parade by Police Sergeant on orders of Magistrate—Is it valid ?

See under—COURT OF CRIMINAL APPEAL DECISIONS 89

Income Tax Ordinance

Gratuities paid to employees by employer on cessation of business—Are they payments of a capital nature under section 10 (*c*) *of the Income Tax Ordinance.*

See under—EXCESS PROFITS DUTY ORDINANCE .. 57

Income Tax Ordinance, sections 64 (2) (*a*), 64 (2) (*b*), 65, 68 (1), 80—*Appellant's returns for three consecutive years accepted and assessed—Thereafter additional assessments made in respect of same three years, purporting to act under a wrong section—Does this invalidate a certificate issued to a Magistrate under section* 80 *?—Failure on the part of the appellant to appeal against such assessments—Has the Magistrate jurisdiction to hear and determine appellant's objections on the basis that the Assistant Commissioner's assessment was not legal ?*

On a certificate issued by the Assistant Commissioner of Inland Revenue under section 80 (1) of the Income Tax Ordinance to the Magistrate, summons was issued on the appellant to show cause why a sum of Rs. 254,745/- being income tax due from him and referred to in the certificate should not be paid.

After inquiry, the appellant was fined the amount of the tax under section 85 and in default he was ordered to undergo six months' simple imprisonment. Thereafter he appealed and filed an application in revision.

It transpired at the inquiry that the appellant had been originally assessed in respect of three consecutive years. The dispute was whether the three additional assessments made and served on the appellant in respect of the same three years, by the Assistant Commissioner purporting to act under section 64 (2) (*b*) were legal or not.

Held : (1) That the Assistant Commissioner was wrong when he purported to act under section 64 (2) (*b*) for he had accepted the return and made an assessment in terms of section 64 (2) (*a*). The correct procedure would have been for him to act under section 65 and make an additional assessment on the basis that the former assessment was less than the proper amount.

(2) That the certificate issued under section 80 is not invalidated by this mistake inasmuch as : (*a*) the error was made by the Assistant Commissioner while exercising a jurisdiction vested in him ; (*b*) such an error is covered by section 68 (1) of the Ordinance ; (*c*) if the appellant was dissatisfied with the assessment made, he should have sought his redress by way of appeal.

(3) That the objection put forward by the appellant is not one which the Magistrate had jurisdiction to hear and determine.

PEIRIS *v.* COMMISSIONER OF INLAND REVENUE .. 81

Industrial Disputes Act

Industrial Disputes Act, as amended by Act No. 62 *of* 1957, *section* 37—"*All costs incidental to any proceedings*" *in that section—Meaning thereof.*

Question of law not certified but appearing on face of record—Will Supreme Court permit it to be raised at hearing ?

Application to Labour Tribunal against dead person—Whether a nullity.

Held : (1) That the Supreme Court will permit a question of law to be raised at the hearing of an appeal even though not certified, if it is apparent from the material on the face of the record.

(2) That the phrase " all costs incidental to any proceedings " in section 37 of the Industrial Disputes Act, (Chap. 37) must be construed as including jurisdiction to make an order as regard final costs relating to the main application and not merely on an interlocutory or incidental matter.

(3) That an application to the Labour Tribunal claiming relief against a dead person is a nullity and any order made by the President is without jurisdiction.

ODIRIS APPUHAMY *v.* UMBICHY 66

Insurance

Insurance—Insurance against third-party risks—Insurer's right to limit his liability in respect of injuries to third parties—Sections 128 *and* 133, *Motor Car Ordinance*, 45 *of* 1938—*Sections* 100 *and* 105, *Motor Traffic Act*, 14 *of* 1951—*Motor Car Ordinance, sections* 127 *to* 149—*Motor Traffic Act, sections* 99 *to* 121.

Interpretation Ordinance, (*Cap.* 1), *section* 6 (3) (*b*) *—Repeal by written law of former written law—Effect of such repeal on a right acquired under former written law—Meaning of word " right " in that sub-section.*

On the 29th March, 1948, the respondent was injured in a motor collision with a lorry, whose owner had insured it with the appellant against injuries to third parties from accident. By the contract of insurance between the appellant and the owner, the liability of the appellant to the owner of the lorry in respect of any accident was limited to the sum of Rs. 20,000/-.

On the 29th March, 1950, the respondent formally gave notice to the appellant of his action against the owner which he had commenced against the latter two days earlier. This notice was given in accordance with the requirements of section 134 of the Motor Car Ordinance (section 106 of the Motor Traffic Act, 14 of 1951). On the 24th of September, 1951, the respondent obtained judgment against the owner for Rs. 30,000/- and sought to enforce it against the appellant in terms of section 133 of the Motor Car Ordinance, 45 of 1938 (section 105 of the Motor Traffic Act, 14 of 1951).

On the 1st September, 1955, the Motor Car Ordinance was repealed and replaced by the Motor Traffic Act, 14 of 1951. The Act of 1951 contained no transitional provisions capable of preserving the right of the respondent which originated under the 1938 Ordinance.

It was argued for the appellant : (1) that the respondent had only a statutory right to claim direct against the appellant under the Motor Car Ordinance, 45 of 1938 and that as the statute under which he gave notice of the action to the appellant had been repealed before he obtained judgment against the owner, he could not now assert any statutory right under it. It was also argued for the appellant : (2) that the liability of the appellant to the respondent was limited to the sum of Rs. 20,000/-.

Held : (1) That the case fell within the meaning of section 6 (3) (*b*) of the Interpretation Ordinance and that the repeal of the Motor Car Ordinance, 45 of 1938, did not affect the right which the respondent had acquired against the appellant under that Ordinance.

(2) That section 133 of the Motor Car Ordinance, 45 of 1938 (section 105 of the Motor Traffic Act, 14 of 1951), did not render the appellant liable to the respondent for a sum greater than Rs. 20,000/-, for which the appellant was liable to the owner of the lorry in accordance with section 128 of the Motor Car Ordinance, 45 of 1938 (section 100 of the Motor Traffic Act, 14 of 1951).

FREE LANKA INSURANCE CO., LTD. *v.* RANASINGHE.. 61

Interpretation Ordinance

Section 6 (3) (*b*)*—Repeal by written law of former written law—Effect of such repeal on a right acquired under former written law—Meaning of " right " in that sub-section.*

See under—INSURANCE 61

Issues

Disposal of preliminary issues before hearing of evidence—Proper occasion for allowing such procedure.

See under—URBAN COUNCILS 25

Judge

Trial—Duty of judge to consider both sides of the question.

See under—APPEAL COURT 1

And jury visiting scene of offence after defence closed—Validity.

See under—COURT OF CRIMINAL APPEAL DECISIONS 89

Jurisdiction

Have our Courts jurisdiction to grant equitable relief against forfeiture to lessee?

See under—LANDLORD AND TENANT 35

Court of Criminal Appeal—Its power to order new trial on directions of Privy Council.

QUEEN *v.* HEMAPALA 2

Privy Council—Its jurisdiction to entertain appeals in criminal matters from Ceylon—Legal status of Privy Council—Right of Her Majesty to make Orders-in-Council in respect of Ceylon.

IBRALEBBE AND ANOTHER *v.* THE QUEEN .. 41

Jurisdiction of Supreme Court to permit question of law not certified but appearing on face of record to be raised at hearing.

See under—INDUSTRIAL DISPUTES ACT .. 66

Exercise of jurisdiction by Magistrate under section 80 *of Income Tax Ordinance—Objections raised by assessee that certificate issued under section* 80 *invalidated by Assistant Commissioner acting under wrong section—Has Magistrate jurisdiction to hear and determine objections of this nature.*

See under—INCOME TAX ORDINANCE 81

Jus Retentionis

See under—COMPENSATION FOR IMPROVEMENTS .. 77

Landlord and Tenant

Landlord and tenant—Lease—Tenant adjudged a lunatic—Arrears of rent—Payment of arrears after notice to quit—Action for ejectment—Have our Courts jurisdiction to grant equitable relief against forfeiture ?

Held : That it is well-settled law as declared by a long line of decisions of the Supreme Court, that the English principle of giving relief against a forfeiture on the ground of non-payment of rent is part of the law of Ceylon.

SANOON *v.* THEYVANDERARAJAH 35

Lease

See under—LANDLORD AND TENANT.

Legal Maxims

Falsus in uno falsus in omnibus.

See under—COURT OF CRIMINAL APPEAL DECISIONS 89

Maintenance

Maintenance Ordinance, section 3—Husband's offer to maintain wife on condition of living with him—Such offer must be " bona fide ".

Held : (1) That the offer referred to in section 3 of the Maintenance Ordinance must be a *bona fide* offer.

(2) That, therefore, in the present case the applicant was entitled to succeed as it could be inferred from the Magistrate's judgment (although he had not stated so) that the offer was not *bona fide.*

THEIVANAI *v.* THEIVANIA 111

Marriage

Under Marriage Registration Ordinance—While such marriage subsisting man embracing Islam and marrying under Muslim Marriage Ordinance—Is it bigamy ?

See under—PENAL CODE 82

Merchandise Marks Ordinance

Section 2—Similarity of device—Whether calculated to deceive ?

See under—TRADE MARKS 23

Minors

Custody of Muslim minors.

See under—MUSLIM LAW 84

Misdirection

See under—COURT OF CRIMINAL APPEAL DECISIONS
See also under—EVIDENCE ORDINANCE 38

Mohammedan Law

Gift " inter vivos "—Deed in form a sale, but in fact, a donation—Intention of parties.

See under—DEEDS 78

Motor Car Ordinance, No. 45 of 1938

Sections 127 *to* 149 *and sections* 128 *and* 133.

See under—INSURANCE 61

Motor Traffic Act, No. 45 of 1951

Sections 100, 105 *and* 99 *to* 121.

See under—INSURANCE 61

Muslim Law

Muslim Law—Shafei sect—Custody of minor female children—When is right to custody lost—Best interests of child—Mother " unworthy of being trusted ".

The petitioner applied to Court for an order directing her husband, the first respondent, from whom she had separated, to hand over to her the custody of her two minor female children.

Both parties were governed by the law applicable to the Shafei sect of Muslims.

Counsel for the first respondent argued that the application must fail since the best interests of the child was the paramount consideration. He submitted that the evidence indicated that the petitioner was a weak-willed woman, completely under the domination of her elder sister, and, therefore, " unworthy of being trusted ".

Held : (1) That though there is no doubt that the Court is called upon to adjudicate in the best interests of the child, such adjudication must be reached within the framework of the law governing the parties.

(2) That under the law applicable to the Shafei sect of Muslims, any disqualification on the ground of being " unworthy of being trusted " must arise out of misconduct.

SITHI MAFTHOOHA *v.* THASSIM AND OTHERS .. 84

See also under—DEEDS 78

Muslim Marriage and Divorce Act—Marriage thereunder by person embracing Islam and whose earlier marriage under the Marriage Registration Ordinance still subsists.

See under—PENAL CODE 82

Non-Direction

See under—COURT OF CRIMINAL APPEAL DECISIONS

Notice

Period of notice to be given to Indian labourer whose contract terminated before ejectment from cooly-line.

See under—EJECTMENT 20

Notice of dishonour—Bills of Exchange Ordinance, sections 48, 49.

See under—BILLS OF EXCHANGE 73

Paddy Lands Act

Paddy Lands Act, No. 1 *of* 1958—*Inquiry under section* 3 (2) *by Assistant Commissioner of Agrarian Services—Order under section* 3 (3) (*b*) *for eviction—Report by another Assistant Commissioner to Magistrate under section* 21 (1) *praying for an order of evic-*

tion against appellant—Order by Magistrate for eviction of appellant after hearing him—Duty of Commissioner to satisfy Magistrate that order for eviction under section 3 (3) (b) was legally made—How may this be done ?—Burden on appellant to show cause why he should not be evicted—How can he discharge such burden ?

The applicant, an Assistant Commissioner of Agrarian Services, presented to the Magistrate a report under section 21 (1) of the Paddy Lands Act, praying for an order to evict the appellant, who, he stated, had failed to vacate a paddy field notwithstanding an order made under section 3 (3) (*b*) of the Act, after an inquiry held under section 3 (2) of the Act.

The appellant appeared before the Magistrate in obedience to the summons issued and showed cause against the eviction. The learned Magistrate, however, held :—

(i) that he was " satisfied that the complainant has t ken all the requisite steps under the Act " ;

(ii) that the appellant had failed to show that he is entitled to occupy the paddy land in question, and granted the order for eviction prayed for.

It was contended in appeal—

(*a*) that the aforesaid order under section 3 (3) (*b*) to vacate the field was made by the applicant's predecessor, and not by the applicant ;

(*b*) that the learned Magistrate should have satisfied himself before he made the order of eviction that the order of the Assistant Commissioner under section 3 (3) (*b*) was valid ;

(*c*) that the burden of proving the validity of the order of the said Commissioner was on the applicant and that he had failed to prove some of the facts necessary for enabling the Commissioner to assume jurisdiction to make the order under section 3 (3) (*b*).

Held : (1) That before making the order for eviction under section 21 (1), the Magistrate should have satisfied himself that the Assistant Commissioner, who made the order under section 3 (3) (*b*) had jurisdiction to make such order.

(2) That the burden of showing cause why he should not be evicted was on the appellant.

(3) That the appellant had shown good cause by establishing from facts elicited in cross-examination of the prosecution witnesses that the evidence placed before the Court was not sufficient to vest the Assistant Commissioner with jurisdiction to make a legal order under section 3 (3) (*b*).

(4) That, therefore, it cannot be held that the applicant satisfied the Court that the aforesaid Assistant Commissioner's order was legally made.

LOKU BANDA *v.* ASSISTANT COMMISSIONER OF AGRARIAN SERVICES, KANDY 31

Paddy Lands Act, No. 1 of 1958—Order for eviction by default—Magistrate's refusal to vacate such order—Appeal to be allowed as default due to illness.

An order by default for eviction from a paddy land was made by a Magistrate against the appellant under section 21 (3) of the Paddy Lands Act, No. 1 of 1958. On an application made supported by a medical certificate to vacate the said order on the ground that the default was due to illness the Magistrate stated that he had no power to do so.

Held : That as the appellant's absence was due to illness, his default should be excused.

APPUWA *v.* ASST. COMMISSIONER, AGRARIAN SERVICES 109

Partition Act

Section 69—Partition action—Deed adduced in proof of title impeached as being a forgery—Attesting witnesses and notary dead—How should such deed be proved.

See under—EVIDENCE ORDINANCE 59

Penal Code

Penal Code, section 362B—Bigamy, conviction for —Marriage under the Marriage Registration Ordinance—While such marriage subsisting man embracing Islam and marrying under Muslim Marriage and Divorce Act a woman who has also embraced Islam—Is he guilty of bigamy ?—Marriage Registration Ordinance, sections 18 and 64.

Held : That a man who has contracted a marriage under the Marriage Registration Ordinance is not guilty of bigamy when, while his marriage is subsisting, he embraces Islam and marries under the Muslim Marriage and Divorce Act, a woman who has also embraced Islam.

REID *v.* THE ATTORNEY-GENERAL 82

Pleadings

Pleadings—Amendment of plaint to include possessory action—Amendment filed after right to said action had been prescribed—Whether amendment bad—Prescription Ordinance, section 4.

Where it was sought to amend a plaint in a *rei vindicatio* action, to include in the alternative, a possessory action at a time when the right to the latter action had been prescribed.

Held : That the amendment should not be allowed.

DHARMASENA *v.* THOMAS AND OTHERS .. 108

Prerogative

See under—ROYAL PREROGATIVE.

Prescription Ordinance

Section 4—Amendment of plaint after action prescribed.

See under—PLEADINGS 108

Privy Council

Privy Council—Right to appeal in criminal cases to Her Majesty in Council—Conviction for murder—Appeal to Court of Criminal Appeal—Point raised that presiding judge's direction that proceedings be conducted in Sinhala when appellant had elected to be

tried by English-speaking jury vitiated the conviction—Dismissal of appeal—Appeal to Her Majesty in Council thereafter—Reversal of judgment of Conrt of Criminal Appeal and quashing of sentence—Direction to Court of Criminal Appeal to decide in its discretion, whether there should be a new trial—Her Majesty's right to make such order—Ceylon Independence Order-in-Council, 1947—*Royal Titles Act*, 1953—*Royal Executive Powers and Seals Act*, 1954.

An appeal was taken to the Court of Criminal Appeal from a conviction on a charge of murder. The question argued was whether the fact that the presiding Judge had directed the proceedings to be conducted in Sinhala, when the appellant had elected to be tried by an English-speaking jury, vitiated the conviction.

The appeal was heard by a specially constituted Bench of five Judges, a majority of whom held that it did not and consequently the appeal was dismissed. Whereupon the accused appealed to Her Majesty the Queen after obtaining special leave to appeal from Her Majesty and also leave to prosecute the same *in forma pauperis*.

The appeal was heard in due course by the Judicial Committee and on 27th May, 1963, they delivered their reasons for the advice they tendered to Her Majesty. Her Majesty accordingly by Order-in-Council dated 30th May, 1963, reversed the judgment appealed from and quashing the appellant's conviction, ordered the Court of Criminal Appeal to decide in its discretion whether there should be a new trial.

When in pursuance of the order the matter came up before the Court of Criminal Appeal, three questions were considered.

(*a*) whether this Court had power at this stage to direct a new trial, and

(*b*) if so, whether that power is conferred on this Court by the Court of Criminal Appeal Ordinance, and

(*c*) if it is not, whether the Order of the Queen of England made with the advice of Her Privy Council confers that power.

Their Lordships after considering : (*a*) the development of the Constitution of Ceylon from the days of her position as a British Colony to the time of the grant of Independence by enacting the Ceylon Independence Act of 1947 and the promulgation of the Ceylon Independence Order-in-Council ; (*b*) the provisions of The Royal Titles Act of 1953, and The Royal Executive Powers and Seals Act of 1954 ; (*c*) certain constitutional documents attached to the judgment as appendices (reproduced at the end of the judgment) ; and (*d*) the opinions of well-known writers on Constitutional Law—

Held : (i) That the effect of the provisions of sections 1 and 4 of the Ceylon Independence Act of 1947 was to end not only the right of the Parliament of England and of the Sovereign in Council of that country to make laws binding on Ceylon, but also the responsibility of Her Majesty's Government in respect of Ceylon. This can be regarded as voluntary abandonment by the Sovereign and Parliament of England of British territory and sovereignty over the subjects therein. The present position of Ceylon is that of an independent country like any other with a monarch at its head, viz., Queen Elizabeth II of England whom Ceylon has adopted as her Queen.

(ii) That the executive power of the Island is vested in Her Majesty and is exercised on Her Majesty's behalf by the Governor-General in accordance with the laws of Ceylon.

(iii) That section 4 (2) of the Ceylon Independence Order-in-Council, 1947, requires Her Majesty to exercise all her powers, authorities and functions as may be in accordance with the constitutional conventions applicable to similar powers, authorities and functions in the United Kingdom by the Sovereign of that country.

(iv) That though the same person is the Sovereign of both Ceylon and England, the rights, powers and prerogatives of each office are distinct. The rights, powers and prerogatives of the office of the Queen of England are not enjoyed by the Queen of Ceylon. This view finds support in the provisions of the Royal Titles Act of 1954 and the Royal Executive Powers Act, 1954.

(v) That the prerogative of Her Majesty in Council to entertain appeals from Colonial Courts is a prerogative that appertains to Her as the Sovereign of a colony and in respect of decisions of Colonial Courts. Therefore, the prerogative cannot be exercised when the relationship of Sovereign and colonial subject comes to an end.

(vi) That the Queen of Ceylon has no Privy Council and our law does not enable Her to make any decisions or perform any acts with the advice of the Privy Council of the Queen of England.

(vii) That—

(*a*) as our Queen does not enjoy the judicial prerogative enjoyed by the Queen of England in respect of Her colonies ;

(*b*) as even the Queen of England has no right to entertain appeals from the Courts of Her own country ;

(*c*) as the right to entertain appeals from the Courts is not a necessary attribute of Sovereign power ;

(*d*) as it is well established that no appeal lies unless conferred expressly or by necessary implication,

The Queen of Ceylon has no right to entertain appeals from our Courts since we attained independence on February, 1948.

(viii) That when the Queen of England gave up Her right to legislate for Ceylon by Order-in-Council, it must be presumed that She gave up Her prerogative without reservation. Further the right to make an Order-in-Council embodying the advice of the Privy Council being one that exists only in respect of colonies, that right cannot be exercised in respect of a country which is no longer subject to the suzerainty of the Sovereign of England.

(ix) That, as regards Ceylon, there is no need to abolish the judicial prerogative of the Queen of England, since that right has ceased to exist with the grant of Independence.

(x) That, therefore, the Order-in-Council passed by Her Majesty in Council in this case ordering the Court of Criminal Appeal to decide in its discretion whether there should be new trial is one which She has no power to make in respect of Ceylon.

(xi) That under the Court of Criminal Appeal Ordinance, the Court has no discretion to order a new trial in the circumstances. The power may be exercised only in an appeal when exercising appellate jurisdiction (*vide* section 5).

Privy Council—Its jurisdiction to entertain and hear appeals in criminal matters from Ceylon—The right of Ceylon citizens to appeal to Her Majesty in Council—Her Majesty's prerogative rights—Have Her Majesty's prerogative rights in respect of judicial matters ceased on attainment of independence by Ceylon—Nature of the functions of the Judicial Committee—Its legal status—Right of Her Majesty to make Orders-in-Council in respect of Ceylon—Constitutional position of Ceylon after independence.

At the hearing of an application by two persons for special leave to appeal to Her Majesty in Council from a judgment of the Supreme Court of Ceylon (upholding their convictions in a District Court upon charges of causing hurt to certain persons), on the ground that the appeals involved an important issue relating to alleged misjoinder of charges, the attention of Their Lordships of the Privy Council was drawn to a decision of the Court of Criminal Appeal in Ceylon, which appeared to challenge the existence of any jurisdiction in Her Majesty in Council to entertain appeals in criminal matters arising in Ceylon. The decision in question was the case of *The Queen* v. *Aluthge Don Hemapala*, reported in 65 N.L.R. 313 and 65 C.L.W. 2. The main basis of that decision is that " the prerogative right of the Sovereign of England to entertain appeals ceased when Ceylon ceased to be a Colony ".

On Their Lordships being informed by counsel for the respondent—The Attorney-General of Ceylon,—that it was highly desirable in the circumstances that an authoritative decision should be obtained, Their Lordships proceeded to consider the grounds of the said decision of the Court of Criminal Appeal in the ligth of the provisions of the legislative enactments of Ceylon, the Ceylon (Constitution) Order-in-Council, 1946, The Ceylon Independence Act of 1947 (11 and 12, Geo. VI, C.7,) the Privy Council Appeals Act of 1833 (3 and 4, Wm. IV), the nature of the appeal to Her Majesty in Council in judicial matters, the legal status of the Judicial Committee and other relevant authorities.

Held : That the effect of Ceylon's attainment of independence and of the accompanying legislative provisions, so far as concerns the present right of Her Majesty to make Orders-in-Council affecting Ceylon is :

(*a*) that there is no power in Her Majesty to legislate for Ceylon or to participate in the Government of Ceylon, through the medium of Orders-in-Council ;

(*b*) that the structure of Courts for dealing with legal matters and the system of appeals existing at the date of independence have not been affected by any of the instruments that conferred that status ;

(*c*) that inasmuch as an Order-in-Council made upon report of the Judicial Committee is the effective judgment to dispose of and implement the Committee's decision of an appeal, the power to make such an order remains unabated ;

(*d*) that it must be recognised that the legislative competence of the Parliament of Ceylon includes power at any time, if it thinks right, to modify or terminate the Privy Council Appeal from its Courts ;

(*e*) that true independence is not in any way compromised by the continuance of that appeal, unless and until the Sovereign legislative body decides to end it.

Per THE JUDICIAL COMMITTEE.—(*a*) " But each such appeal civil or criminal is, if admissible at all, admissible as an appeal to Her Majesty's prerogative right to act as a final resort in the administration of justice, and there is not for this purpose any significant distinction between those that are entertained only by special leave and those which are regulated and admitted in accordance with a fixed set of rules, whether emanating originally from Order-in-Council, charter or letters patent or legislation local to the territory itself ".

(*b*) " The requirement of the Order-in-Council which is made upon an appeal that all persons concerned in the territory shall take notice of it and govern themselves accordingly is complemented in Ceylon by the provisions of those legislative enactments which direct the Courts there to give effect to judgments of the Privy Council on appeal and recognize in unambiguous language the ' undoubted right and authority of Her Majesty to admit or receive any appeal from any judgment decree sentence or order of the Court of Criminal Appeal or the Supreme Court '. The words last quoted appear in section 23 of the Court of Criminal Appeal Ordinance (Revised Legislative Enactments of Ceylon, 1956, Ch. 7). Similar words occur in section 333 of the Criminal Procedure Code, (1956, Ch. 20). The Courts Ordinance (1956, Ch. 6), on the other hand, which deals with criminal as well as civil jurisdiction contains, in section 38, the direction that in all cases of

appeal to the Privy Council allowed by the Supreme Court or by Her Majesty in Council the transcript of the record is to be forwarded to the Privy Council, and in section 40, the duty is imposed on all Courts, supreme or original, to 'conform to execute and carry into immediate effect' judgments of the Privy Council on appeal. The same duty is imposed in the same words where criminal matters are concerned by section 334 of the Criminal Procedure Code".

IBRALEBBE AND ANOTHER *v.* THE QUEEN .. 41

See also under—APPEALS (PRIVY COUNCIL) ORDINANCE 53

Privy Council Decisions

(1) IBRALEBBE AND ANOTHER *v.* THE QUEEN .. 41
(2) ABDULLA GULAB *v.* ABDUL KHALEQ .. 78
(3) DAVID *v.* ABDUL CADER 25
(4) FREE LANKA INSURANCE CO., LTD. *v.* RANASINGHE 61

Rei Vindicatio

"Exceptio rei venditae et traditae"—Whether doctrine applicable in case of a donation—"Rei vindicatio" action—Validity of gift when donor is not owner—Burden of proving plaintiff's title—Evidence Ordinance, sections 32 (5), 110.

The plaintiff brought a *rei vindicatio* action against the defendant who was admittedly in possession of the property in suit, tracing his title through one Sinnathangam, wife of Sinnathamby, who had donated the property to her. Sinnathamby's title to the property was derived from a Crown Grant which was made to him after he had transferred the property to his wife.

Held : (1) That the exception *exceptio rei venditae et traditae* does not apply in the case of a donation. The donee must take the subject-matter of the gift as it stood at the date of conveyance and if at that time the donor's title to it was bad, the consequent defective title passing to the donee cannot be remedied by the subsequent acquisition of good title by the donor.

(2) That as the defendant has admittedly been in possession of the land in suit for eight years, it is for the plaintiff to establish his title to the land he claims and failure to prove any one link in the chain of title is fatal to his case.

KANAPATHIPILLAI *v.* VETHANAYAGAM 74

Roman-Dutch Law

Delict—Malicious misuse of statutory power to issue licence—Right to recover damages.

See under—URBAN COUNCILS 25

Royal Executive Powers and Seals Act, 1954

See under—PRIVY COUNCIL 2

Royal Prerogative

The rights and privileges of the Queen of England are not the same as those of the Queen of Ceylon though the same person is Sovereign of both countries.

See under—PRIVY COUNCIL 2

Has Her Majesty the right to entertain appeals from Ceylon Courts after Ceylon obtained Independence ?

See under—PRIVY COUNCIL 2
See under—PRIVY COUNCIL 41

Her Majesty's Prerogative Rights—Effect thereon after grant of Independence to Ceylon—Right of Her Majesty to make Orders-in-Council in respect of Ceylon.

See under—PRIVY COUNCIL 41

Royal Titles Act, 1953

See under—PRIVY COUNCIL 2

Search

Without search warrant—Validity.

See under—EVIDENCE 37

Statute

Statutory power to grant licence vested in public authority—Malicious misuse of—Delict—Remedy.

See under—URBAN COUNCILS 25

Interpretation of Statutes.

See under—INSURANCE 61

Trade Marks

Similarity of device—Whether calculated to deceive—Merchandise Marks Ordinance, section 2.

The accused, a manufacturer of aerated waters, was convicted of having in his possession for sale or any purpose of trade, bottles of aerated water to which had been falsely applied a trade mark so nearly resembling the trade mark of the Ceylon Cold Stores, Ltd., as to be calculated to deceive.

It was in evidence that both manufacturers offered to the public a drink known as "Lanka Orange". The labels on both brands contained a representation of an orange in an orange colour on a green background.

The dissimilarities were as follows :—

(*a*) The labels on the bottles of Ceylon Cold Stores, Ltd., contained the representation of an elephant, the expression "Elephant Brand" and the name "Ceylon Cold Stores, Ltd."

(*b*) The labels on the bottles of the second contained the representation of the lotus flower, the expression "Lotus Brand" and the name "Dominion Aerated Water Co., 20/1, Rodney Street, Colombo".

Held : That the accused had not possessed goods to which a trade mark so nearly resembling the trade mark of the Ceylon Cold Stores, Ltd., as to be calculated to deceive had been falsely applied.

THIYAGARAJAH *v.* NAVARATNAM 23

Trusts

Trusts Ordinance, section 102—*Action withdrawn owing to defect in certificate of Government Agent—Is separate application under section* 102 (3) *necessary before filing fresh action—Whether fresh certificate issued under earlier application sufficient for this purpose.*

In a plaint filed under section 102 (3) of the Trusts Ordinance in respect of a Hindu Temple, the certificate issued by the Government Agent, which was a pre-requisite of the action, had a formal defect in that the Government Agent had failed to certify that the Commissioner reported that the subject-matter of the plaint was one that called for the consideration of the Court, and that it had not proved possible to bring about an amicable settlement of the questions involved. The plaintiffs withdrew the action with liberty to file a fresh action on the same cause of action. Thereafter, the plaintiffs, without making a separate application to the Government Agent for a fresh inquiry and a fresh report, filed the present action on the same cause of action with a fresh certificate from the Government Agent which complied with the provisions of the section.

Held : That it was not necessary to make a separate application to the Government Agent with respect to the plaint in the second action, nor was a fresh inquiry or a fresh report necessary, as the cause of action in the first and second action was the same. As the Commissioner had already inquired into the matter and reported to the Government Agent, there had been a compliance with section 102 (3) of the Trusts Ordinance, and the present action was properly constituted.

ARUMAITHURAI *v.* ARUDCHELVANAYAGAM .. 111

Urban Councils

Urban Councils Ordinance, (Cap. 255)—*Chairman's statutory power of granting licences—Statutory power vested in a public authority—Malicious misuse of—Whether there is a right to recover damages—Delict—Roman-Dutch Law.*

Issues—Disposal of preliminary issues before hearing of evidence—Proper occasion for allowing such procedure.

Under the Urban Councils Ordinance, (Cap. 255), the respondent as Chairman of the Urban Council of Puttalam had power to issue or refuse licences under the Public Performances Ordinance, (Cap. 134). The appellant, who was the proprietor of a cinema at Puttalam, sued the respondent, and in his plaint alleged that he had duly applied to the respondent for a licence for his cinema ; that the cinema was in a fit and proper building suitable for public performances ; that he had paid the fee for the licence ; that he had fulfiled all necessary and/or reasonable conditio s entitling him to the issue of a licence ; but that nevertheless the respondent had wrongfully and maliciously refused and neglected to issue the required licence to the appellant's loss and damage which he estimated at Rs. 35,000/-. The respondent, in his answer, pleaded specifically that the plaint disclosed no cause of action against him and raised it as a preliminary issue which would dispose of the whole action.

The District Judge heard legal argument on that issue alone, and, without hearing any evidence, dismissed the appellant's action on the ground that, as the respo dent was acting as Chairman of the Urban Council in the matter of the licence, he could not be sued " in his private capacity for something he had done in his capacity as the Chief Executive Officer of the Urban Council of Puttalam ".

Held : (1) That under the Urban Councils Ordinance, the Chairman is himself the local authority for granting of licences for cinema performances, that this power was his responsibility alone and not that of the Council, and that, therefore, the appellant's action could not be considered defective on that ground.

The Supreme Court did not express any view as to the validity of the point that had succeeded in the District Court, but held that the plaint disclosed no cause of action on a different ground. The Supreme Court adopted the view that for an action in delict to succeed there must have been an infringement of a legal right, that the appellant had no such right, since under the statute he was not entitled to exhibit cinematographs without the licence of the Chairman, and it had been left to the discretion of the Chairman, whether to grant or withhold the licence. In the opinion of the Supreme Court, even if the Chairman had acted maliciously in withholding the licence, no right of the appellant had been infringed, and his proper and only remedy was to apply for a writ of mandamus to ensure that his application was duly heard and determined.

Held : (2) That the question to be determined was not what rights the appellant had without a licence, but rather what rights were created between these two parties by the relationship under which the appellant wished to operate a cinema and had applied for a licence to do so, and that the respondent had the statutory responsibility for deciding how to deal with that application. If the facts alleged by the appellant in the plaint were true, it was impossible to say, with-

out investigating the facts, that the respondent did not owe some duty to the appellant with regard to the execution of his statutory power ; and if, as pleaded, he had been malicious in refusing to grant the licence, it was equally impossible to say, without investigating facts, that there could not have been a breach of a duty giving rise to a claim for damages. For these reasons the action was not one that could justly be disposed of on preliminary issues argued in advance of the hearing of the evidence.

DAVID *v.* ABDUL CADER 25

Words and Phrases

" abatement "—Privy Council Appeals.

PEIRIS *v.* DASSENAIKE 53

" bharakara " (භාරකාර) in Sinhala deed of gift.

SILVA *v.* SENAHAMY AND OTHERS 106

" certified copy "

PONNUDURAI *v.* S.I., POLICE, VALVETTITURAI .. 50

" forthwith "—in Criminal Procedure Code.

ISSADEEN *v.* INSPECTOR OF POLICE, BADULLA .. 18

ASEERWATHAM *v.* KANDIAH 29

" Indian estate labourers "

SUPERINTENDENT, OAKWELL ESTATE *v.* LANKA ESTATE WORKERS' UNION 52

" judgment "—in Appeals (Privy Council) Ordinance

PEIRIS *v.* DASSENAIKE 53

" order "—in Appeals (Privy Council) Ordinance

PEIRIS *v.* DASSENAIKE 53

" right "—in section 6 (3) (b) of Interpretation Ordinance

FREE LANKA INSURANCE CO. LTD. *v.* RANASINGHE 61

Present : **Bertram, C.J. and Garvin, J.**

SUNDERAM PULLE *vs.* KATHIRASEPULLE

S.C. No. 441—*D.C. Negombo, No.* 15956.

Argued and decided on : 2nd July, 1924.

Appeal Court—Its duty when it appears that trial judge had to choose between two versions an adopted one, on grounds insufficient—Certain points in favour of the other party not fully investigated—Duty of trial judge—Desirability of fresh trial.

Held : That where it appears to the Appeal Court that the learned trial Judge had to choose between the two versions of the opposing parties and adopted the version of one party, on grounds not altogether sufficient, while there exist certain points in favour of the other party which points have not been properly investigated, the justice of the case requiries that the judgement should be *pro forma* set aside and the case remitted for a new trial where all the facts may be very fully investigated.

Per BERTRAM C.J. :—" It is a great pity I think that Judges, when they see two sides fencing with one another and manoeuvring for position should conceive themselves merely as umpires in a game of strategy and should not themselves determine that the truth must be ascertained and themselves call witnesses who for strategic reasons or through misconception are withheld by either party ".

Samarawickreme, for the appellant.

Sandrasegara, K.C., with *R. C. Fonseka*, for the respondent.

BERTRAM, C.J.

In this case I cannot help feeling that the position is very unsatisfactory. The learned Judge had to choose between two versions. He has adopted the version of the defendant, as it seems to us, on grounds not altogether sufficient. Yet it must be admitted that there are certain points in favour of the defendant, and we feel reluctant to reverse the judgment in the case without the facts being more fully considered.

The action is an action upon a cheque. It has been referred to as a post-dated cheque ; but it is not that. An arrangement was made that it should not be presented for three months. The case for the plaintiff is that this cheque was given in respect of a special transaction—a loan of Rs. 5,000/-. The case for the defendant is that it was not given in respect of a special transaction, but that the cheque was paid in respect of a mortgage bond on which the defendant was indebted to the plaintiff's firm and to other Chetty firms. There are as I have said, certain strong points against the story of the plaintiff, and there are certain flaws in the judgment of the learned Judge which adopts the defendant's story.

In the first place, the learned Judge appears to be under a misconception as regards certain instalments supposed to have been paid upon this bond. He says that it is a singular thing that the amount Rs. 5,000/- is exactly that of the instalment payable on the bond. I cannot see any evidence of any such instalment. The other instalment that was paid was over the amount payable. Moreover, the amount paid was not the amount of these supposed instalments. According to the defendant's account it was not Rs. 5,000/- but Rs. 7,000/- that is Rs. 5,000/- on the cheque and Rs. 2,000/- remitted to his surety. The learned Judge also says that he is not satisfied that the payment of money was ever proved. There is definite evidence that it was paid. The plaintiff himself says that he cashed the cheque with one of the other Chetty firms—parties to the mortgage bond—obtained the money, took it to Kurunegala, and paid it there to the defendant's agent. This transaction is supported by entries in two sets of books. The learned Judge says that one entry is open to suspicion. But there appears to be no suspicion against the other. There is, moreover, the fact that the idea of giving a cheque, which is in effect a post-dated cheque, as payment for a sum on account of the mortgage bond, is very peculiar. On the other hand, there is this to be said for the defendant.

No acknowledgment was taken of payment due at his office at Kurunegala. Mr. Samarawickreme says that this is entirely in accordance with Chetty practice. But I cannot help thinking that it is extremely unusual for a Chetty to go to an office and pay over Rs. 5,000/- and come away without

any receipt. In the next place, it is certainly singular that no interest was charged on this loan, or no commission deducted. Again Mr. Samarawickreme says that this is the kind of thing that Chetties do. They appear, therefore, to be most trustful and benevolent. There is this further to be said that the whole story of the arrangement that the money should be obtained on the cheque and taken to Kurunegala was never put to the defendant in cross-examination. The defendant had to begin, and he gave his story. He was not cross-examined with regard to this arrangement ; nor was he cross-examined with regard to the alleged payment at Kurunegala. It was only when the plaintiff's case was developed that this story was put forward. Later it appears that the defendant had in Court his manager at Kurunegala to whom the payment was said to have been made, and the books of his Kurunegala office. He indicated that those were at the disposal of the plaintiff. He did not, however, as he might have done, apply for leave to call rebutting evidence.

The result is that the learned Judge had not the facts of the case fully before him. It is a great pity I think that Judges, when they see two sides fencing with one another and manoeuvring for position, should conceive themselves merely as umpires in a game of strategy and should not themselves determine that the truth must be ascertained and themselves call witnesses, who for strategic reasons or through misconception are withheld by either party. I think it would be unsatisfactory either to sustain or to reverse this judgment on the materials before us, and my own view of the justice of the case is that the judgment should be *pro forma* set aside, and the case remitted for a new trial when all the facts may be very fully investigated.

With regard to costs, I would leave the costs both in the Court below and in this Court to abide the result of the new trial.

GARVIN, J.

I agree.

Set aside and sent back.

IN THE COURT OF CRIMINAL APPEAL

Present : **Basnayake, C.J. (President), Herat, J., and Abeyesundere, J.**

THE QUEEN *vs.* ALUTHGE DON HEMAPALA

Appeal No. 230 *of* 1960 *with Application No.* 253 *of* 1960—*S.C. No.* 41, *M.C. Horana No.* 27640.

Argued on : September 23, 24, 25 and 27, 1963.
Decided on : October 14, 1963.

Privy Council—Right of appeal in criminal cases to Her Majesty in Council—Conviction for murder —Appeal to Court of Criminal Appeal—Point raised that presiding judge's direction that proceedings be conducted in Sinhala when appellant had elected to be tried by English-speaking jury vitiated the conviction—Dismissal of appeal—Appeal to Her Majesty in Council thereafter—Reversal of judgment of Court of Criminal Appeal and quashing of sentence—Direction to Court of Criminal Appeal to decide in its discretion, whether there should be a new trial—Her Majesty's right to make such order—Ceylon Independence Order-in-Council, 1947—*Royal Titles Act*, 1953—*Royal Executive Powers and Seals Act*, 1954.

An appeal was taken to the Court of Criminal Appeal from a conviction on a charge of murder. The question argued was whether the fact that the presiding Judge had directed the proceedings to be conducted in Sinhala, when the appellant had elected to be tried by an English-speaking jury, vitiated the conviction.

The appeal was heard by a specially constituted Bench of five Judges, a majority of whom held that it did not and consequently the appeal was dismissed. Whereupon the accused appealed to Her Majesty the Queen after obtaining special leave to appeal from Her Majesty and also leave to prosecute the same *in forma pauperis*.

The appeal was heard in due course by the Judicial Committee and on 27th May, 1963, they delivered their reasons for the advice they tendered to Her Majesty. Her Majesty accordingly by Order-in-Council dated 30th May, 1963, reversed the judgment appealed from and quashing the appellant's conviction, ordered the Court of Criminal Appeal to decide in its discretion whether there should be a new trial.

When in pursuance of the order the matter came up before the Court of Criminal Appeal, three questions were considered.

(*a*) whether this Court had power at this stage to direct a new trial, and

(*b*) if so, whether that power is conferred on this Court by the Court of Criminal Appeal Ordinance, and

(*c*) if it is not, whether the Order of the Queen of England made with the advice of Her Privy Council confers that power.

Their Lordships after considering: (*a*) the development of the Constitution of Ceylon from the days of her position as a British Colony to the time of the grant of Independence by enacting the Ceylon Independence Act of 1947 and the promulgation of the Ceylon Independence Order-in-Council; (*b*) the provisions of The Royal Titles Act of 1953, and The Royal Executive Powers and Seals Act of 1954; (*c*) certain constitutional documents attached to the judgment as appendices (reproduced at the end of the judgment); and (*d*) the opinions of well-known writers on Constitutional Law—

Held : (i) That the effect of the provisions of sections 1 and 4 of the Ceylon Independence Act of 1947 was to end not only the right of the Parliament of England and of the Sovereign in Council of that country to make laws binding on Ceylon, but also the responsibility of Her Majesty's Government in respect of Ceylon. This can be regarded as voluntary abandonment by the Sovereign and Parliament of England of British territory and sovereignty over the subjects therein. The present position of Ceylon is that of an independent country like any other with a monarch at its head, viz., Queen Elizabeth II of England whom Ceylon has adopted as her Queen.

(ii) That the executive power of the Island is vested in Her Majesty and is exercised on Her Majesty's behalf by the Governor-General in accordance with the laws of Ceylon.

(iii) That section 4 (2) of the Ceylon Independence Order-in-Council, 1947, requires Her Majesty to exercise all her powers, authorities and functions as may be in accordance with the constitutional conventions applicable to similar powers, authorities and functions in the United Kingdom by the Sovereign of that country.

(iv) That though the same person is the Sovereign of both Ceylon and England, the rights, powers and prerogatives of each office are distinct. The rights, powers and prerogatives of the office of the Queen of England are not enjoyed by the Queen of Ceylon. This view finds support in the provisions of the Royal Titles Act of 1953 and the Royal Executive Powers Act, 1954.

(v) That the prerogative of Her Majesty in Council to entertain appeals from Colonial Courts is a prerogative that appertains to Her as the Sovereign of a colony and in respect of decisions of Colonial Courts. Therefore, the prerogative cannot be exercised when the relationship of Sovereign and colonial subject comes to an end.

(vi) That the Queen of Ceylon has no Privy Council and our law does not enable Her to make any decisions or perform any acts with the advice of the Privy Council of the Queen of England.

(vii) That—(*a*) as our Queen does not enjoy the judicial prerogative enjoyed by the Queen of England in respect of Her colonies ;

(*b*) as even the Queen of England has no right to entertain appeals from the Courts of Her own country ;

(*c*) as the right to entertain appeals from the Courts is not a necessary attribute of Sovereign power ;

(*d*) as it is well established that no appeal lies unless conferred expressly or by necessary implication.

The Queen of Ceylon has no right to entertain appeals from our Courts since we attained independence on 4th February, 1948.

(viii) That when the Queen of England gave up her right to legislate for Ceylon by Order-in-Council, it must be presumed that she gave up Her prerogative without reservation. Further the right to make an Order-in-Council embodying the advice of the Privy Council being one that exists only in respect of colonies, that right cannot be exercised in respect of a country which is no longer subject to the suzerainty of the Sovereign of England.

(ix) That, as regards Ceylon, there is no need to abolish the judicial prerogative of the Queen of England, since that right has ceased to exist with the grant of Independence.

(x) That, therefore, the Order-in-Council passed by Her Majesty in Council in this case ordering the Court of Criminal Appeal to decide in its discretion whether there should be new trial is one which she has no power to make in respect of Ceylon.

(xi) That under the Court of Criminal Appeal Ordinance, the Court has no discretion to order a new trial in the circumstances. That power may be exercised only in an appeal when exercising appellate jurisdiction (*vide* section 5).

Colvin R. de Silva with *S. S. Basnayake* and *P. O. Wimalanaga*, for the accused-appellant.

A. C. Alles, Solicitor-General, with *R. S. Wanasundere, Crown Counsel*, for the Attorney-General.

BASNAYAKE, C.J.

The appeal of the appellant, Aluthge Don Hemapala, from his conviction for murder was heard by a specially constituted Bench of five Judges of this Court and was dismissed on 11th December, 1961 (64 N.L.R. 1). The question that arose for decision was whether the fact that the presiding Judge had directed the proceedings to be conducted in Sinhala when the appellant had elected to be tried by an English-speaking jury vitiated his conviction. A majority of the Judges held that it did not. The appellant asked for special leave from Her Majesty the Queen of England to appeal to Her from that decision and was granted special leave to appeal by Order-in-Council, dated 30th July, 1962 (Appendix I). He also asked for and was, by Order-in-Council, dated 11th April, 1963 (Appendix II), granted leave to prosecute his appeal *in forma pauperis*.

The appeal was heard in due course and on 27th May, 1963, the Judicial Committee delivered their reasons for the advice they proposed to tender to Her Majesty (Appendix III).* By Order-in-Council, dated 30th May, 1963 (Appendix IV) the Queen in Council, while reversing the judgment of this Court, dated 11th December, 1961, and quashing the appellant's conviction ordered this Court to decide in its discretion whether there should be a new trial. The questions we are called upon to decide are—

(*a*) whether we have power at this stage to direct a new trial, and

(*b*) if so, whether that power is conferred on this Court by the Court of Criminal Appeal Ordinance, and

(*c*) if it is not, whether the Order of the Queen of England made with the advice of Her Privy Council confers that power.

* Not reproduced here as it is already reported in 64 C.L.W. p. 87

The right of appeal in criminal cases to His Majesty in Council (the expression " His Majesty in Council " is used herein with reference to the Sovereign for the time being for England when acting with the advice of His or Her Privy Council) is one that His Majesty's subjects in Ceylon enjoyed from the day Ceylon became a Crown Colony. His Majesty's subjects in England (which expression herein includes Scotland) do not enjoy the right of appeal to His Majesty in Council from the decisions of the Courts in that country, whether civil or criminal, although the Sovereign is regarded as the Fountain of Justice (*vide* Blackstone's exposition in Appendix V). It is a right peculiar to His Majesty's colonial subjects and the right of His Majesty in Council to entertain such appeals in the case of Ceylon rested on prirogative of His Majesty in Council to entertain appeals from the Courts of His Colonies. The expression " colony " is used herein in the sense in which it is defined in the English Interpretation Act. The origin of the prerogative of appeal in respect of the colonies is not clear ; but Chitty (Chitty on Prerogative (1820 ed.), p. 29), states why such a power was necessary in the case of colonies. He states—

> " . . . If the Judicial superintending power over his colonies, etc., by way of appeal, were not vested in the King, the law might be insensibly changed to the destruction of the superiority of the mother-country. The King cannot give a direction to any Court to rehear any cause depending therein ; but rehearings are granted or denied by Courts of Equity, on petition of the parties grieved."

It is the prerogative of His Majesty in Council to entertain appeals from His colonial subjects in cases from the colonial Courts and at the same time it is the right of the colonial subjects to appeal to His Majesty in Council in such cases. The constitutional progress of Ceylon until the country gained independence did not affect that right, because, despite the increasing measure of internal self-government granted from time to time, Ceylon remained a colony in respect of which His Majesty in Council had power to

legislate by Order-in-Council. The right is, therefore, dependent on the existence of the relationship of colonial subject and Sovereign. Once that relationship is ended, the right also comes to an end.

Till May 1946, Ceylon was a colony of the Sovereign of England and the people of Ceylon were His Majesty's subjects although the Ceylon Government had almost complete control over its domestic affairs. In May, 1946, there was granted by Order-in-Council (The Ceylon (Constitution) Order-in Council, 1946), a constitution in a form not intrinsically different from the constitutions of countries which were classed as Dominions in the Colonial Laws Validity Act, although the grant was by prerogative Order-in-Council and not by Act of Parliament as in the case of those countries. This grant of a further advance on the existing constitutional powers was preceded by a statement of policy by the British Government on Constitutional Reform, published on 31st October, 1945 (Appendix VI). As stated in its preamble, a direct outcome of the recommendations of the Commission referred to in the statement of policy was the Order-in-Council of 1946 (Appendix VII). The following year saw a radical change in the constitution that was granted in 1946. In December, 1947, there was enacted the Ceylon Independence Act, 1947, and at the same time there was promulgated the Ceylon Independence Order-in-Council, 1947. Both instruments came into operation on 4th February, 1948, which has since been observed as the day of National Independence. The Independence Act contained two important provisions which have with modification been inserted in subsequent enactments of the Parliament of England granting independence to countries over which the Sovereign of that country and its Parliament had authority. Those provisions are far reaching. They read—

> "1. (1) No Act of Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to Ceylon as part of the law of Ceylon, unless it is expressly declared in that Act that Ceylon has requested, and consented to, the enactment thereof.
>
> (2) As from the appointed day His Majesty's Government in the United Kingdom shall have no responsibility for the Government of Ceylon.
>
> (3) As from the appointed day the provisions of the First Schedule to this Act shall have effect with respect to the legislative powers of Ceylon."

The most important change effected by the Independence Order-in Council is the cessation of the power of the Sovereign of England to promulgate prerogative Orders-in-Council in respect of Ceylon. The provision reads—

> "4. The power of His Majesty, His Heirs and Successors, with the advice of His or Their Privy Council—
>
> (*a*) to make laws having effect in the Island for the purposes specified in sub-section (1) of section 30 of the Principal Order ; and
>
> (*b*) to revoke, add to, suspend or amend the Principal Order or the Amending Orders, or any part of those Orders,
>
> shall cease to exist."

Section 30 of the Ceylon (Constitution) Order-in-Council, 1946, (Appendix VIII) which reserved that power was revoked.

It would appear from the constitutional documents referred to above that on 4th February, 1948, there ended not only the right of the Parliament of England and of the Sovereign in Council of that country to make laws binding on Ceylon but also the responsibility of His Majesty's Government in respect of this country. In other words, Ceylon became on 4th February, 1948, a country no longer dependent on England or subject to the Sovereign of that country, in brief an independent country as indicated in the short title of the legislative instruments designed to achieve that end. If it is necessary to relate the grant of independence to Ceylon to one of the accepted ways in which British subjects can lose their nationality, the act can be regarded as voluntary abandonment by the Sovereign and Parliament of England of British territory and sovereignty over the subjects therein. Instances of abandonment in the past are rare, but are multiplying with the grant of independence to countries which were once dependent on England.

The present position of Ceylon is that it is an independent country like any other with a monarch at its head. It is an equal partner in that association of nations known as the Commonwealth of Nations. Before Ceylon became independent, King George the Sixth was the Sovereign of Ceylon, and when it passed from subjection to independence, King George the Sixth of England was adopted as Ceylon's Sovereign. On his demise and the succession to the throne of England of Elizabeth the Second as Queen of England, Ceylon adopted her as Queen. Our ambassadors to foreign Courts are accredited by Elizabeth the Second as Queen of Ceylon. All our legislative enactments are enacted by Her with the advice

and consent of the Senate and the House of Representatives (section 38, Order-in-Council), the Governor-General is appointed by Her on the advice of the Prime Minister of Ceylon (section 4, Order-in-Council), and every Senator and every Member of the House of Representatives is, by law, bound to take an Oath of Allegiance to Her (section 25, Order-in Council). The executive power of the Island is vested in Her and is exercised on Her behalf by the Governor-General in accordance with the laws of this country (section 45). No Bill can become an Act of Parliament without Her consent [section 36 (1) Order-in-Council] which the Governor-General is empowered to give in Her name or refuse as the case may be (section 36 (2) Order-in-Council). Our law requires Her (section 4(2) Order-in-Council) to exercise all Her powers, authorities and functions under the Ceylon (Constitution) Order-in-Council or any other law as far as may be in accordance with the constitutional conventions applicable to the exercise of similar powers, authorities and functions in the United Kingdom by the Sovereign of that country. In order to bring out the fact that the Sovereign of England is Queen of this country, not in Her capacity as Queen of England, the Royal Titles Act and the Royal Executive Powers and Seals Act were enacted in 1953 and 1954, respectively. The first-named Act provides—

> " 2. The assent of the Parliament of Ceylon is hereby given to the adoption by Her Majesty for use in relation to Ceylon of the style and titles set out in the Schedule to this Act, in lieu of the style and titles at present appertaining to the Crown, and to the issue by Her for that purpose, at the request of the Prime Minister of Ceylon, of Her Royal Proclamation under the Great Seal.
>
> SCHEDULE
>
> (*Style and titles referred to*).
>
> ' ELIZABETH THE SECOND, Queen of Ceylon and of Her other Realms and Territories, Head of the Commonwealth '."

The Queen of Ceylon by a Proclamation, dated 28th May, 1953, adopted that title in the following terms:—

> " BY THE QUEEN
> A PROCLAMATION."
>
> " WHEREAS by the Royal Titles Act, No. 22 of 1953, the assent of the Parliament of Ceylon was given to the adoption by Us, for use in relation to Ceylon, of the Style and Titles set forth in the Schedule to the said Act, in lieu of the Style and Titles at present appertaining to the Crown, and to the issue by Us for that purpose of our Royal Proclamation under the Great Seal :
>
> We have thought fit, and We do hereby at the request of the Prime Minister of Ceylon appoint and declare, that as far as conveniently may be on all occasions and in all instruments wherein Our Style and Titles are used in relation to Ceylon, our Style and Titles shall forthwith be accepted, taken and used as the same are set forth in the Schedule to the said Act, that is to say—
>
> ' ELIZABETH THE SECOND, Queen of Ceylon and of Her other Realms and Territories, Head of the Commonwealth '."

The Royal Executive Powers and Seals Act which came into operation on 20th August, 1954, helps to emphasize the fact that, although the same person is Sovereign of both England and Ceylon, the Sovereign of this country derives no powers from the Sovereign of England (section 2), and that she enjoys only such powers as are conferred on Her by our laws. The provision of a " Royal Signet of Ceylon " (section 8) of which the Prime Minister of Ceylon is the keeper (section 9) and which the Prime Minister is empowered to affix to such instruments bearing the Sovereign's Sign Manual and the counter-signature of the Prime Minister as the Sovereign may from time to time by Proclamation specify as instruments to which the Royal Signet shall be affixed (section 10) further enhances the fact that, though the same person is the Sovereign of both Ceylon and England, the rights, powers and prerogatives of each office are distinct and that the rights, powers and prerogatives of the office of the Queen of England are not enjoyed by the Queen of Ceylon. The case of one person being Sovereign of two different countries with separate powers in respect of each country is not without precedent. William IV was both King of England and King of Hanover, but as King of Hanover he did not enjoy over the Hanoverian subjects the prerogatives of the King of England. On his demise the succession to the throne of England was determined according to the law of England and the succession to the throne of Hanover was determined according to the law of Hanover. The role of being Sovereign of two independent nations at the same time is not difficult so long as there is agreement between the two nations. But if perchance they disagree, and the disagreement results in a rupture of diplomatic relations between them, then the Sovereign will be faced with a difficult situation.

Now the prerogative of Her Majesty in Council to entertain appeals from colonial Courts being a prerogative that appertains to Her as the Sovereign of a colony and in respect of decisions of colonial Courts, and the right of appeal to

Her Majesty in Council being a right that is enjoyed by Her colonial subjects, the prerogative cannot be exercised when the relationship of Sovereign and colonial subject comes to an end. In this connexion it would be useful to cite the following passages from Chalmers' Opinions :—

> " . . . the true correlatives are *sovereignty*, and *subjection* : if the *subjection* be withdrawn, and so admitted, the *sovereignty* is gone : if the *sovereignty* be removed, then, is the *subjection* gone ; and the subjection being gone, the people, owing no subjection, are no longer subjects ; for they are all correlatives, which cannot exist, without each other," (*Chalmers*, Vol. II, p. 391).

> " When the *sovereignty* of those provinces thus ceased to be in the King of England, the subjection of the people, within the same, also ceased." (*Chalmers*, Vol. II, p. 393).

> " When the King, acting in pursuance of a solemn trust, derived from the constitution, renounced all claim of government over you, and, of course, released your subjection, the King thereby signified the assent of the nation, that you should be no longer subjects, but aliens ; for in making every treaty, the king, as trustee for the nation, binds the nation, by his diplomatic acts, and *lex nil jubet frustra*." (*Chalmers*, Vol. II, p. 412).

The Queen of Ceylon has no Privy Council and our law does not enable Her to make any decisions or perform any acts with the advice of the Privy Council of the Queen of England. Our Queen does not enjoy the judicial prerogative of the Queen of England in respect of Her colonies. As stated above, even the Queen of England has no right to entertain appeals from the Courts of that country. The right to entertain appeals from the Courts is not a necessary attribute of Sovereign power. It is well established that no appeal lies unless conferred expressly or by necessary implication. The Queen of Ceylon has, therefore, no right to entertain appeals from our Courts. It is unthinkable that the Queen of England would claim that Ceylon is yet a colony in respect of which She enjoys the judicial prerogative. It is equally unthinkable that the Queen of England would do any act that would in the slightest degree impair the independence of Ceylon. When the Queen of England gave up Her right to legislate for Ceylon by Order-in-Council, it must be presumed that She gave up Her prerogative without reservation, and that She gave up Her prerogative right to promulgate any Order-in-Council having the force of law in Ceylon, for it is an established rule of construction of legal instruments that the greater includes the less. Apart from that, the right to make an Order in-Council embodying the advice of the Privy Council being one that exists only in respect of colonies, that right cannot be exercised in respect of a country which is no longer a colony and is no longer subject to the suzerainty of the Sovereign of England. The resulting position then is that on the attainment of independence the prerogative right of the Sovereign of England to entertain appeals ceased when Ceylon ceased to be a colony.

The fact that Canada (section 106 of the Supreme Court Amendment Act, 1949 (13 Geo. VI, c. 37)), India (The abolition of the Privy Council Jurisdiction Act, 1949—10th October, 1949) ; Pakistan (Privy Council (Abolition of Jurisdiction) Act, 1950—1st May, 1950) ; and South Africa (Privy Council Appeals Act, No. 16 of 1950 (which substituted for section 106 of the South Africa Act, a new section abolishing appeals to the Privy Council—12th April, 1953)) abolished by legislative measure the right of appeal to His Majesty in Council does not make it necessary that this country should do likewise. The laws of no two countries of the Commonwealth are the same. So that the action taken by one country affords no precedent for the other. The question whether the judicial prerogative of the Sovereign of England would continue until it is abolished has to be answered by reference to the laws of each country. In this connexion the provision made in the Malayan Constitution by which the Malayan King, to whom appeal from the Supreme Court of that country lies, is able to obtain the advice of the Judicial Committee of the Privy Council of the Sovereign of England calls for notice (Appendix IX). As respects Ceylon, there is no need to abolish a right that has ceased to exist, for there is nothing to abolish.

The Order-in-Council passed by Her Majesty in Council is one which She has no power to make in respect of Ceylon. We have, therefore, no power, in obedience to that Order in Council, to order a new trial, even if we were so minded, as the order is not legal. Under the Court of Criminal Appeal Ordinance we have no discretion to order a new trial at this stage. That power may be exercised only in an appeal to this Court when exercising its appellate jurisdiction (section 5, Court of Criminal Appeal Ordinance).

This judgment is limited to the questions whether a citizen of Ceylon has, since the coming into force of the Ceylon Independence Act and the Ceylon Independence Order in Council, a right to invoke the prerogative power of the Sovereign of England in Council of entertaining an appeal

from the Courts of a British Colony in a criminal matter, and whether the prerogative right of the Sovereign of England in Council to entertain appeals from Ceylon in criminal cases ceased on Ceylon becoming an independent country.

Before we part with this judgment we think we should not omit to state that the recognition, when Ceylon was a British colony, in the Statutes of Ceylon (Appendix X), of the prerogative right of His Majesty in Council to entertain appeals from the Ceylon Courts, does not have the effect of creating a right of appeal by implication and continuing it even after Ceylon has ceased to be a colony and the judicial prerogative of the Sovereign in criminal cases has ceased in respect of this country. When the very foundation of the prerogative to entertain such appeals is gone, those provisions have no application to what does not exist.

The reversal of the decision of the Court of Criminal Appeal and the quashing of the appellant's conviction are unaffected by our present decision, as our present decision cannot affect past acts which have taken effect.

As we have no power to direct a new trial, we order that the appellant be discharged from custody, if he is still in custody, or be released from bail, if he has given bail in consequence of our order of 27th September last admitting him to bail.

Accused discharged.

APPENDIX I.

THE 30TH DAY OF JULY, 1962.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 17th day of July, 1962, in the words following, viz. :—

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order-in-Council of the 18th day of October, 1909, there was referred unto this Committee a humble Petition of Aluthge Don Hemapala in the matter of an Appeal from the Court of Criminal Appeal, Ceylon, between the Petitioner and Your Majesty, Respondent, setting forth : that the Petitioner prays for special leave to appeal to Your Majesty in Council from the Judgment and Order of the Court of Criminal Appeal of Ceylon, dated the 25th October, 1961, whereby the Petitioner's Appeal against his conviction of murder and sentence to death on the 20th day of December, 1960, by the Supreme Court at Kalutara was dismissed ; And humbly praying Your Majesty in Council to grant him special leave to appeal against the Judgment and Order of the Court of Criminal Appeal of Ceylon, dated the 25th October, 1961, and for further or other relief :

" THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order-in-Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment and Order of the Court of Criminal Appeal of Ceylon dated the 25th day of October. 1961 :

" AND Their Lordships do further report to Your Majesty that the proper officer of the said Court of Criminal Appeal ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried nto execution.

WHEREOF the Governor-General or Officer Administering the Government of Ceylon for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly."

1.

ORDER IN COUNCIL MAKING CONTINUING ORDER DIRECTING THAT ALL APPEALS TO HIS MAJESTY IN COUNCIL SHALL BE REFERRED TO THE JUDICIAL COMMITTEE

1909 No. 1228.

AT THE COURT AT BUCKINGHAM PALACE, THE 18TH DAY OF OCTOBER 1909.

Present :
THE KING'S MOST EXCELLENCY MAJESTY IN COUNCIL.

WHEREAS by Section 9 of the Judicial Committee Act, 1844 it is enacted " that in case any Petition of Appeal whatever shall be presented addressed to Her Majesty in Council and such Petition shall be duly lodged with the Clerk of the Privy Council it shall be lawful for the Judicial Committee to proceed in hearing and reporting upon such Appeal without any Special Order-in-Council referring the same to them provided that Her Majesty in Council shall have by an Order-in-Council in the month of November directed that all Appeals shall be referred to the said Judicial Committee on which Petitions may be presented to Her Majesty in Council during the twelve months next after the making of such Order and that the said Judicial Committee shall proceed to hear and report upon all such Appeals in like manner as if each such Appeal had been referred to the said Judicial Committee by a Special Order of Her Majesty in Council. Provided always that it shall be lawful for Her Majesty in Council at any time to rescind any General Order so made and in case of such Order being so rescinded all Petitions of Appeal shall in the first instance be preferred to Her Majesty in Council and shall not be proceeded with by the said Judicial Committee without a Special Order of reference " :

AND WHEREAS by the Interpretation Act 1889 it is enacted that " in this Act and in every other Act whether passed before or after the commencement of this Act reference to the Sovereign reigning at the time of the passing of the Act or to the Crown shall unless the contrary intention appears be construed as references to the Sovereign for the time being " :

AND WHEREAS His Majesty was pleased by His Order in Council dated the 21st day of November 1908 and made under and by virtue of the provisions of the said Section 9 of the Judicial Committee Act, 1844, to order that all Appeals or Complaints in the nature of Appeals on which Petitions might be presented to His Majesty in Council during the twelve months next after the date of the said Order should be referred to the Judicial Committee and that the said Judicial Committee should proceed to hear and report upon all such Appeals or Complaints in like manner as if each such Appeal had been referred to the said Judicial Committee by a Special Order of His Majesty in Council and that the said Order should remain in force for the space of twelve months from the date thereof unless His Majesty should be pleased previously to rescind the same :

AND WHEREAS by Section 5 of the Appellate Jurisdiction Act, 1908, it is enacted that " His Majesty may from time to time by Order-in-Council make a General Order directing that all Appeals shall be referred to the Judicial Committee of the Privy Council until the Order is rescinded and Section 9 of ' The Judicial Committee Act, 1844 ', shall have effect as if any such General Order for the time being in force were substituted in the first proviso to that Section for the Annual Order therein referred to and the time for which the Order remains in force were substituted for the twelve months next after the making of the General Order " and that " the expression ' Appeals ' in this Section means Appeals on Petitions presented to His Majesty in Council and includes any Complaints in the nature of Appeals and any Petitions in the matter of Appeals " :

NOW, therefore, His Majesty is pleased by and with the advice of His Privy Council to order and it is hereby ordered that His Majesty's said Order-in-Council, dated the 21st day of November, 1908, be and the same is hereby rescinded and that all Appeals on which Petitions may be presented to His Majesty in Council after the date of this Order shall be referred to the Judicial Committee of the Privy Council until His Majesty shall be pleased to rescind this Order and that the said Judicial Committee shall proceed to hear and report upon all such Appeals in like manner as if each such Appeal had been referred to the said Judicial Committee by a Special Order of His Majesty in Council.

WHEREOF all persons whom it may concern are to take notice and govern themselves accordingly.

APPENDIX II.

THE 11TH DAY OF APRIL, 1963.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council, dated the 27th day of February, 1963, in the words following, viz. :—

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order-in-Council of the 18th day of October, 1909, there was referred unto this Committee a humble Petition of Aluthge Don Hemapala in the matter of an Appeal from the Court of Criminal Appeal, Ceylon, between the Petitioner Appellant and Your Majesty, Respondent (Privy Council Appeal, No. 30 of 1962), setting forth that on the 30th day of July, 1962, Your Majesty in Council granted the Petitioner special leave to appeal against the Judgment of the Court of Criminal Appeal of Ceylon, dated the 25th day of October, 1961, whereby the Petitioner's Appeal was dismissed against his conviction of murder and the sentence of death passed upon him by the Supreme Court at Kalutara on the 20th day of December 1960 ; that the Petitioner now prays for leave to prosecute his said Appeal in *forma pauperis:* that the Petitioner has been informed by his friends and relatives who have hitherto provided monies for his defence that no further monies are available for the prosecution of his Appeal: that the Petitioner is not worth £100 in the world excepting his wearing apparel and that he is unable to provide sureties : And humbly praying Your Majesty in Council to grant the Petitioner leave to prosecute the Appeal in *forma pauperis :*

" THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order-in-Council have taken the humble Petition into consideration and Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to prosecute his Appeal *in forma pauperis.*"

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed, obeyed and carried into execution.

WHEREOF the Governor-General or Officer Administering the Government of Ceylon for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly."

APPENDIX III.

See Privy Council Judgment in 64 C.L.W. 87

APPENDIX IV.

THE 30TH DAY OF MAY, 1963.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council, dated the 27th day of May 1963, in the words following, viz:-

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee the matter of an Appeal from the Court of Criminal Appeal Ceylon between Aluthge Don Hemapala Appellant and your Majesty Respondent (Privy Council Appeal No. 30 of 1962) and likewise the humble Petition of the Appellant setting forth that on the 17th day of October 1960 the Appellant was indicted on a charge of murder by causing the death of Mahawattage Don Carolis being an offence punishable under Section 296 of the Penal Code of Ceylon: that on the 7th July 1960 the Appellant was charged in the Magistrate Court at Horana with murder and the Appellant having elected to be tried by a jury drawn from an English-speaking panel of jurors was committed for trial by the Supreme Court of Ceylon: that the said indictment was tried in the Supreme Court of Ceylon and a jury drawn from an English-speaking panel and the hearing was conducted in the Sinhala language and on the 20th December, 1960, the Appellant was convicted of murder and sentenced to death: that the Appellant appealed to the Court of Criminal Appeal in Ceylon and on the 25th October, 1961, that Court dismissed the Appeal; that on the 30th July, 1962, by Order of Your Majesty in Council the Appellant was granted special leave to appeal to Your Majesty in Council: that on the 11th April, 1963, by Order of Your Majesty in Council the Appellant was granted leave to prosecute his said Appeal *in forma pauperis:* And humbly praying Your Majesty in Council to take this Appeal into consideration and to reverse, alter or vary the Judgment of the Court of Criminal Appeal of Ceylon, dated the 25th day of October, 1961, and for further or other relief :

" THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the Appeal and humble Petition into consideration and having heard Counsel on behalf of the Parties on both sides Their Lordships do this day agree humbly to report to Your Majesty as their opinion that this Appeal ought to be allowed and the Judgment of the Court of Criminal Appeal Ceylon dated the 25th day of October 1961 reversed leaving that Court to exercise a discretion whether there should be a new trial."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed, obeyed and carried into execution.

WHEREOF the Governor-General or Officer Administering the Government of Ceylon for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly."

APPENDIX V.

III. Another capacity, in which the King is considered in domestic affairs is, as the fountain of justice and general conservator of the peace of the kingdom. By the fountain of justice, the law does not mean the *author* or *original*, but only the *distributor*. Justice is not derived from the King, as from his *free gift* ; but he is the steward of the public, to dispense it to whom it is *due*. He is not the spring, but the reservoir, from whence right and equity are conducted, by a thousand channels, to every individual. The original power of judicature, by the fundamental principles of society, is lodged in the society at large : but, as it would be impracticable to render complete justice to every individual, by the people in their collective capacity, therefore, every nation has committed that power to certain select magistrates, who, with more ease and expedition, can hear and determine complaints ; and in England this authority has immemorially been exercised by the king or his substitutes. He, therefore, has alone the right of erecting Courts of judicature; for, though the constitution of the kingdom hath intrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust ; it is consequently necessary that Courts should be erected, to assist him in executing this power ; and equally necessary that, if erected, they should be erected by his authority. And hence it is, that all jurisdictions of Courts are either mediately or immediately derived from the Crown, their proceedings run generally in the king's name, they pass under his Seal, and are executed by his officers.

It is probable, and almost certain, that in very early times, before our constitution arrived at its full perfection, our kings in person often heard and determined causes between party and party. But at present, by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of their several courts; which are the grand depositaries of the fundamental laws of the kingdom and have gained a known and stated jurisdiction, regulated by certain and established rules, which the Crown itself cannot now alter but by act of parliament. And, in order to maintain both the dignity and independence of the judges in the superior Courts it is enacted by the statute 13 Will. III c. 2, that their commissions shall be made (not, as formerly, *durante bene placito*, but) *quamdiu bene se gesserint*, and their salaries ascertained and established; but that it may be lawful to remove them on the address of both houses of parliament.

(*Blackstone's Commentaries*, 1836 ed., Vol. I, pp. 266, 267 and 268).

APPENDIX VI.

(*Ceylon Government Gazette Extraordinary*, No. 9,480 of October 31, 1945).

CEYLON

STATEMENT OF POLICY ON CONSTITUTIONAL REFORM

The present Constitution of Ceylon, which is based on the Executive Committee system of the London County Council was set up in 1931 as a result of the recommendations of a Commission presided over by the Earl of Donoughmore. The Governor has certain reserved powers, the more important of which are in respect of Defence, External Affairs and the rights of minorities ; and a considerable measure of self-government in matters of internal civil administration rests with a Legislature very largely elected territorially on the basis of universal adult suffrage.

2. Since the introduction of this Constitution, there has been continuous pressure, especially but not solely from the Sinhalese majority community, for the grant of a further measure of self-government. On the 26th May, 1943, His Majesty's Government issued a Declaration on the reform of the Constitution, which reads as follows :—

" (1) The post-war re-examination of the reform of the Ceylon Constitution, to which His Majesty's Government stands pledged, will be directed towards the grant to Ceylon by Order of His Majesty in Council, of full responsible Government under the Crown in all matters of internal civil administration.

(2) His Majesty's Government will retain control of the provision, construction, maintenance, security, staffing, manning and use of such defences, equipment, establishments and communications as His Majesty's Government may deem necessary for the Naval, Military and Air security of the Commonwealth, including that of the Island, the cost thereof being shared between the two Government's in agreed proportions.

(3) Ceylon's relations with foreign countries and with other parts of the British Commonwealth of Nations will be subject to the control and direction of His Majesty's Government.

(4) The Governor will be vested with such powers as will enable him, if necessary, to enact any direction of His Majesty's Government in regard to matters within the scope of paragraphs 2 and 3 of this Declaration ; and his assent to local measures upon these matters will be subject to reference to His Majesty's Government.

(5) The present classes of Reserved Bills in the Royal Instructions will be largely reduced under a new Constitution. Apart from measures affecting Defence and External Relations, it is intended that these shall be restricted to classes of Bills which—

(*a*) relate to the Royal Prerogative, the rights and property of His Majesty's subjects not residing in the Island, and the trade and shipping of any part of the Commonwealth ;

(*b*) have evoked serious opposition by any racial or religious community and which in the Governor's opinion are likely to involve oppression or unfairness to any community ;

(*c*) relate to currency.

(6) The limitations contained in the preceding paragraph will not be deemed to prevent the Governor from assenting in the King's name to any measure relating to, and conforming with, any trade agreements concluded with other parts of the Commonwealth. It is the desire of His Majesty's Government that the Island's commercial relations should be settled by the conclusion of agreements, and His Majesty's Government will be pleased to assist in any negotiations with this object.

(7) The framing of a Constitution in accordance with the terms of this Declaration will require such examination of detail and such precision of definition as cannot be brought to bear so long as the whole of the energies of the Service and other Departments of His Majesty's Government remain focussed on the successful prosecution of the war. His Majesty's Government will, however, once victory is achieved, proceed to examine by suitable Commission or Conference such detailed proposals as the Ministers may in the meantime have been able to formulate in the way of a complete constitutional scheme, subject to the clear understanding that acceptance by His Majesty's Government of any proposals will depend :—

First, upon His Majesty's Government being satisfied that they are in full compliance with the preceeding portions of this Statement ;

Secondly, upon their subsequent approval by three-quarters of all Members of the State Council of Ceylon, excluding the Officers of State and the Speaker or other presiding Officer.

(8) In their consideration of the problem, His Majesty's Government have very fully appreciated and valued the contribution which Ceylon has made and is making to the war effort of the British Commonwealth and the United Nations, and the co-operation which, under the leadership of the Board of Ministers and the State Council, has made this contribution effective."

It will be seen that the declared object of His Majesty's Government in considering further constitutional reform is the grant to Ceylon of full responsible government under the Crown in all matters of internal civil administration. The principal subjects which will continue to be reserved to His Majesty's Government are Defence, External Relations and safeguards ensuring fair arrangements in Ceylon for the minority communities.

3. In accordance with paragraph 7 of the 1943 Declaration Ceylon Ministers were asked to frame a Constitution for the Island, which would then be examined by a Commission or Conference. The Ministers completed their task of drafting a Constitution in February, 1944, but owing to a disagreement with His Majesty's Government as regards the scope of the Commission or Conference which was to examine their Scheme, they withdrew it in August, 1944. The difficulty arose from the fact that they claimed the Declaration to mean that the Commission or Conference was to be confined entirely to the examination of the question whether the constitutional Scheme was in conformity with the 1943 Declaration, while His Majesty's Government took the view that the Commission or Conference would have wider terms of reference enabling it to examine the Constitutional Scheme from all angles, and especially that of its suitability in relation to the minorities, and to discuss it with the latter.

4. Notwithstanding the Ministers' withdrawal of their Scheme, therefore, His Majesty's Government proceeded in September, 1944, to announce the appointment of a Commission with terms of reference as follows :—

"To visit Ceylon in order to examine and discuss any proposals for constitutional reform in the Island which have the object of giving effect to the Declaration of His Majesty's Government on that subject dated the 26th May, 1943 ; and, after consultation with various interests in the Island, including minority communities, concerned with the subject of constitutional reform, to advise His Majesty's Government on all measures necessary to attain that object."

The Commission, under the Chairmanship of Lord Soulbury, visited Ceylon from December 1944, until April 1945, and its Report was published on the 9th October.

5. The Constitution recommended by the Soulbury Commission may be briefly summarised as follows, the reference in brackets being to the Soulbury Commission's Report :—

(*a*) The Government of Ceylon would consist of a Governor-General, with the reserve powers set out in the 1943 Declaration, and a Cabinet, with an Upper and Lower House.

(*b*) Universal adult suffrage would be retained on the present basis. (Paragraph 223).

(So far as suffrage of immigrants into Ceylon is concerned, the Commission regards this as a matter of internal civil administration, and proposes that the Ceylon Government should be granted the right to determine the future composition of its population with full powers of control in respect of immigration).

(*c*) A Delimitation Commission would be appointed by the Governor-General in his discretion to define new electoral districts. (Paragraph 278).

(*d*) The Lower House would be designated the House of Representatives and would consist of 95 elected members together with six members who would be nominated by the Governor-General. (Members of the Lower House would be known as Members of Parliament). (Paragraph 321).

(*e*) The Upper House would be designated the Senate, and would consist of 30 members, of whom 15 would be elected by the Lower House and 15 nominated by the Governor-General acting in his discretion. (Paragraph 310).

(*f*) There would be a Cabinet with Ministers possessing full Cabinet responsibility in all matters of internal affairs in Ceylon, subject to the reservations contained in paragraphs 2, 3 and 5 of the 1943 Declaration. (Paragraph 330).

(*g*) There would be a Prime Minister appointed by the Governor-General. The Prime Minister would hold the portfolios of External Affairs and Defence. [(Paragraphs 325, 330 (ii), 360 (xi)].

(*h*) Appointments to the Public Services would be made on the recommendation of a Public Services Commission to be nominated and appointed by the Governor-General in his discretion (*i.e.*, after consultation with the Prime Minister, but without being bound to follow his advice). Paragraph 392).

(*i*) There would be a Judiciary in which the Chief Justice and Judges of the Supreme Court would be appointed by the Governor-General acting in his discretion with a Judicial Services Commission to advise him in regard to subordinate judicial appointments. (Paragraph 407.)

The safeguards for minority communities include the proposals for a Second Chamber and for the Public Services Commission. The first can be expected to provide an instrument for impeding precitate legislation and for handling inflammatory issues in a cooler atmosphere (paragraph 298) ; while the Public Services Commission is designed as an impartial and authoritative body, free from the taint of partisanship, on whose advice the Governor-General will exercise his powers of appointment to the Public Service and the promotion and discipline of Public Officers. (Paragraphs 374, 379, 389).

The Constitution provides the following safeguards for minority interests (European and Asiatic) :—

(*a*) Classes of reserved Bills will include any Bills which relate to the Royal Prerogative, the rights and property of His Majesty's subjects not residing in the Island, and the trade or transport or communications of any part of the Commonwealth. (Paragraph 332).

(*b*) The Classes of reserved Bills will also include any Bill which has "evoked serious opposition by any racial or religious community and which, in the Governor-General's opinion, is likely to involve oppression or unfairness to any community." (Paragraph 332).

(*c*) In regard to immigration into Ceylon, the Report recommends that Bills relating to the prohibition or restriction of immigration will not be regarded as coming within the category of Bills which the Governor-General will reserve for the signification of His Majesty's pleasure, but if any such Bill contains a provision regarding the right of re-entry of persons normally resident in the Island at the date of the passing of the Bill by the Legislature, which, in the opinion of the Governor-General, is unfair or unreasonable, the Governor-General must be required to reserve that Bill. (Paragraph 332 (ii) (*b*) and 236).

(*d*) The Soulbury Commission's Report further recommends that, in relation to the further class of Bills relating to external affairs which are to come within the category of reserved Bills, there shall be excluded from the category of Bills relating to external affairs " any Bill relating solely to the prohibition or restriction of the importation of or the imposition of import duties upon any class of goods, provided that such legislation is not discriminatory in character." (Paragraph 332 (ii) (*d*).

(*e*) The Report further recommends that the Order-in-Council shall provide that the Ceylon Parliament " shall not make any law to prohibit or restrict the free exercise of any religion ; or to alter the constitution of any religious body " except at the request of the governing authority of that religious body (Paragraph 334), and " shall not make any law rendering persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable, or confer upon persons of any community or religion any privileges or advantages which are not conferred on persons of other communities or religions." (Paragraph 242 (iii)).

The powers reserved by His Majesty's Government under the 1943 Declaration are to be secured in the Commission's proposals in the following ways :—

(*a*) DEFENCE.—Any Bills on this subject must be reserved by the Governor-General. (Paragraphs 332 (i) and 349 *et seq.*)

(*b*) EXTERNAL AFFAIRS.—Bills in this category are also to be reserved. (Paragraphs 332 (ii), 337 and 338).

In both these subjects the Governor-General will have power himself to enact any measures necessary to comply with the directions of His Majesty's Government. (Paragraph 337).

(*c*) CURRENCY.—Legislation must be reserved by the Governor-General. (Paragraph 332 (iii)).

(*d*) TRADE, TRANSPORT AND COMMUNICATIONS AFFECTING ANY PART OF THE EMPIRE.—Any Bill of an extraordinary nature or importance which may prejudice these interests must be reserved. (Paragraph 332 (iv)).

6. The principal reaction of the Sinhalese majority community to a Constitution on these lines has been to take the line that the 1945 Declaration can in the post-war situation no longer be regarded as a satisfactory basis for a new Constitution for Ceylon. Issued as it was during the war, it received a limited degree of acceptance by Ministers, principally as an improvement on the existing Constitution which would enable Ceylon to put forward her full war effort more efficiently. Now that the war is over, however, in their view the principal reason for the retention by His Majesty's Government of such extensive reserved powers, especially in regard to Defence and External Affairs, is no longer operative. Moreover, since Dominion Status as soon as circumstances permit has been promised to Burma, the Ministers claim that Ceylon, in view of her large-scale and valuable war effort, should now be advanced to the status of a Dominion. By April, 1945, the Ceylon State Council had already passed by a considerable majority, including minority Members, the so-called Sri Lanka Bill, which framed a Constitution on Dominion lines of Ceylon and immediate Dominion status is now the object of the Sinhalese majority and their supporters. This demand, they say, need not prejudice the legitimate interests of His Majesty's Government in regard to Defence, provided that these can be safeguarded by an agreement to be reached between His Majesty's Government in the United Kingdom and the Government of Ceylon by which His Majesty's Government would be vested with all necessary powers in regard to Defence. The acceptance of a claim for Dominion status would involve the question of the transference of Ceylon affairs from the Colonial to the Dominion Office.

7. The reaction of the Sinhalese majority and their supporters to the individual provisions of the Soulbury Constitution may be briefly summarised as follows :—

THE SECOND CHAMBER is regarded as unnecessary and undemocratic by an important section.

THE GOVERNOR-GENERAL'S POWERS as laid down in the Soulbury recommendations would establish a system of diarchy on certain subjects which would give rise to continued difficulty in practice. The solution to this is the conclusion of a separate agreement not appearing in the Constitution between His Majesty's Government in the United Kingdom and the Government of Ceylon, by which in effect the normal constitutional procedure would be set aside for a limited purpose.

MINORITY SAFEGUARDS.—No objection is raised to the provision safeguarding minorities, as a whole, but as stated above opposition has been expressed to the proposed Second Chamber which was designed by the Commission to be one of the principal minority safeguards.

8. The principal minority community in Ceylon is the Tamil community, the two main divisions of which, Ceylon Tamil and Indian Tamil, together form about a quarter of the total population of the Island. While the Sinhalese regard the Soulbury recommendations as not going far enough, the Tamils regard them as going too far. In their view, no system of weighted representation combined with powers of the Governor to reserve Bills can, in practice, provide proper safeguards against the overwhelming power which is to be put into the hands of the Sinhalese community, who will be in a permanent majority in the future Legislature. Moreover, discrimination against minorities occurs in practice not so much overtly in the form of discriminatory legislation, as in less obvious administrative acts. The only satisfactory method of providing for this situation, in the view of the Tamil minority, is the system known as " balanced representation " (described in paragraph 254-264 of the Soulbury Report), under which half the total number of seats in the Legislature would be reserved to the Sinhalese majority community, the remaining half being divided in agreed proportion between the minorities, the statutory division of seats being extended to the Cabinet, in which each community would have an allotted representation.

9. The scheme of balanced representation is not, however, supported by the remaining minority communities, who are primarily anxious that they should secure adequate representation in whatever new Legislature is set up.

DECISIONS

10. His Majesty's Government are in sympathy with the desire of the people of Ceylon to advance towards Dominion Status and they are anxious to co-operate with them to that end. With this in mind His Majesty's Government have reached the conclusion that a Constitution on the general lines proposed by the Soulbury Commission (which also conforms in broad outlines, save as regards the Second Chamber, with the constitutional scheme put forward by the Ceylon Ministers themselves) will provide a workable basis for constitutional progress in Ceylon.

Experience of the working of Parliamentary Institutions in the British Commonwealth has shown that advance to Dominion Status has been effected by modification of existing constitutions and by the establishment of conventions which have grown up in actual practice.

Legislation such as the Statute of Westminster has been the recognition of constitutional advances already achieved rather than the instrument by which they were secured. It is, therefore, the hope of His Majesty's Government that the new constitution will be accepted by the people of Ceylon with a determination so to work it that in a comparatively short space of time such Dominion Status will be evolved. The actual length of time occupied by this evolutionary process must depend upon the experience gained under the new constitution by the people of Ceylon.

11. The main features of the Constitution under which Ceylon will be governed during this period will follow the general lines of the recommendations of the Soulbury Commission, with the following principal modifications :—

(*a*) Life of the Upper House.—The provisions as regards the life of the Upper House will be changed so that one-third of the Membership will retire after two years, and a further third after four years, the arrangements proposed by the Soulbury Commission being followed for their replacement.

(*b*) Reserved Powers of the Governor.—In place of the recommendations of the Soulbury Commission that the Governor shall be empowered to enact special Ordinances dealing with Defence and External Affairs, His Majesty's Government will retain the power to legislate for Ceylon by Order-in-Council, and the Governor will be provided by Order-in-Council to be brought into operation by Proclamation in case of a public emergency with powers to make regulations for purposes such as those specified in the Emergency Powers (Defence) Act, 1939. During the operation of the new Constitution the present title of Governor will not be altered, and the channel of communication between the Government of Ceylon and His Majesty's Government in the United Kingdom will remain as at present through the Governor and the Secretary of State for the Colonies, who will retain his present ministerial responsibility in regard to Ceylon Affairs.

(*c*) Breakdown of the Constitution.—Any contingency arising in this respect will be covered by the general power of His Majesty's Government to legislate for Ceylon by Order-in-Council which will include, if necessary, suspension of the Constitution.

(*d*) Shipping.—The Ceylon Government will be empowered to establish and regulate shipping services, both coastal and overseas, provided that no action is taken without the concurrence of His Majesty's Government in the United Kingdom, which may be interpreted as subjecting the shipping of other members of the Commonwealth to differential treatment.

(*e*) PUBLIC SERVICES.—The period of exercise of the right of retirement of certain classes of officers specified in paragraph 372 (ii) of the Soulbury Report will be reduced from three to two years from the date of the meeting of Parliament under the new Constitution ; and the exercise of the special right of retirement with compensation for loss of career will not extend to officers appointed to the Public Services on agreement for a limited period of years.

THE QUESTION OF THE THREE-QUARTERS MAJORITY.

12. In Section 7 of the 1943 Declaration His Majesty's Government made it clear that acceptance of any constitutional proposals put forward by the Ceylon Ministers would depend upon the subsequent adoption of such proposals by three-quarters of the members of the State Council of Ceylon, excluding the Officers of State and the Presiding Officer. This provision was inserted because the 1943 Declaration contemplated the adoption of a constitution worked out by the Ministers and did not specifically require that they should consult minority interests.

This condition was thus attached in the past to constitutional proposals to be put forward by the Ceylon Ministers and His Majesty's Government have decided not to insist upon the acceptance of the constitution now proposed by the Soulbury Commission (after full consultation with minority interests), by so large a proportion of the State Council as three-quarters, though they earnestly hope that all those with the future interests of Ceylon at heart will co-operate by giving their support to the new constitution now offered as a foundation upon which may be built a future Dominion of Ceylon, His Majesty's Government will take into account the views expressed by the State Council and the number of those in that Council who vote in favour of adopting the new constitution.

APPENDIX VII.

WHEREAS by the Orders-in-Council set out in the First Schedule to this Order provision is made for the constitution of a State Council for the Island of Ceylon :

AND WHEREAS in the years 1944 and 1945 a Commission was appointed by His Majesty's Government under the chairmanship of the Right Honourable Herwald, Baron Soulbury, O.B.E., M.C., to visit the Island of Ceylon in order to examine and discuss proposals for constitutional reform, and the said Commission duly visited the Island and made a report to His Majesty's Government :

AND WHEREAS a Statement of Policy on Constitutional Reform in Ceylon was presented to Parliament by His Majesty's Government in the month of October, 1945 :

AND WHEREAS paragraph 10 of the said Statement of Policy contained the following decision :

" His Majesty's Government are in sympathy with the desire of the people of Ceylon to advance towards Dominion status and they are anxious to co-operate with them to that end. With this in mind, His Majesty's Government have reached the conclusion that a Constitution on the general lines proposed by the Soulbury Commission (which also conforms in broad outline, save as regards the Second Chamber, with the Constitutional scheme put forward by the Ceylon Ministers themselves) will provide a workable basis for constitutional progress in Ceylon.

" Experience of the working of Parliamentary institutions in the British Commonwealth has shown that advance to Dominion status has been effected by modification of existing constitutions and by the establishment of conventions which have grown up in actual practice.

" Legislation such as the Statute of Westminster has been the recognition of constitutional advances already achieved rather than the instrument by which they were secured. It is, therefore, the hope of His Majesty's Government that the new constitution will be accepted by the people of Ceylon with a determination so to work it that in a comparatively short space of time such Dominion status will be evolved. The actual length of time occupied by this evolutionary process must depend upon the experience gained under the new constitution by the people of Ceylon " :

AND WHEREAS, having regard to the matters aforesaid, it is expedient to revoke the said Orders-in-Council and to make other provision in lieu thereof :

(*Government Gazette Extraordinary*, No. 9,554 of 17th May, 1946).

APPENDIX VIII.

30. (1) His Majesty, His Heirs and Successors, with the advice of His or Their Privy Council, may from time to time make such laws as may appear to Him or Them to be necessary—

(*a*) for the defence of any part of His Majesty's dominions (including the Island) or any territory under His Majesty's protection or any territory in which His Majesty has from time to time jurisdiction, or for securing and maintaining public safety and order and supplies and services in case of public emergency ; or

(*b*) for regulating the relations between the Island and any foreign country or any part of His Majesty's dominions or any territory as aforesaid.

(2) Any law made in pursuance of the provisions of sub-section (1) of this Section may provide for the making of rules, regulations, orders and other instruments for any of the purposes for which such laws are authorised by this Section to be made, and may contain such incidental and supplementary provisions as appear to His Majesty in Council to be necessary or expedient for the purposes of the law.

(3) No law made in pursuance of the provisions of sub-section (1) of this Section shall impose any charge on the revenues or funds of the Island or regulate the importation of goods into or the exportation of goods from the Island, except to give effect to any agreement to which the Government of the Island is a party.

(4) His Majesty hereby reserves to Himself, His Heirs and Successors power, with the advice of His or Their Privy Council, to revoke, add to, suspend or amend this Order, or any part thereof, as to Him or Them shall seem fit.

(*Ceylon Government Gazette Extraordinary*, No. 9,554 of May 17, 1963).

APPENDIX IX.

131. (1) The Yang di-Pertuan Agong may make arrangments with Her Majesty for the reference to the Judicial Committee of Her Majesty's Privy Council of appeals from the Supreme Court ; and, subject to the provisions of this Article, an appeal shall lie from that Court to the Yang di-Pertuan Agong in any case in which such an appeal is allowed by federal law or by clause (2), and in respect of which provision for reference to the said Committee is made by or under the enactments regulating the proceedings of the said Committee.

(2) Until Parliament otherwise provides, an appeal is allowed under this Article in the following cases, that is to say :—

(*a*) in the case of any decision from which an appeal from the Supreme Court of the Federation would have been entertained by Her Majesty in Council (with or without special leave) immediately before Merdeka Day ; and

(*b*) in the case of any decision as to the effect of any provision of this Constitution, including any opinion pronounced on a reference under Article 130.

(3) Any appeal under this Article shall be subject to such conditions as to leave or otherwise as may be prescribed by federal law or by or under the enactments regulating the proceedings of the Judicial Committee of Her Majesty's Privy Council.

(4) On receiving from Her Majesty's Government in the United Kingdom the report or recommendation of the said Committee in respect of an appeal under this Article, the Yang di-Pertuan Agong shall make such order as may be necessary to give effect thereto.

(*The Federation of Malaya Independence Order-in-Council*, 1957).

APPENDIX X.

COURT OF CRIMINAL APPEAL ORDINANCE.

23. Nothing in this Ordinance contained may or shall take away or abridge the undoubted right and authority of Her Majesty to admit or receive any appeal from any judgment, decree, sentence or order of the Court of Criminal Appeal or the Supreme Court on behalf of Her Majesty or of any person aggrieved thereby in any case in which, and subject to any conditions or restrictions upon of under which, Her Majesty may be graciously pleased to admit or receive any such appeal.

CRIMINAL PROCEDURE CODE.

333. Nothing herein contained may or can take away or abridge the undoubted right and authority of Her Majesty to admit or receive any appeal from any judgment, decree, sentence, or order of the Supreme Court or any criminal Court

on behalf of Her Majesty or of any person aggrieved thereby in any case in which and subject to any conditions or restrictions upon or under which Her Majesty may be graciously pleased to admit or receive any such appeal.

334. The Supreme Court and all Courts from which an appeal shall be taken in any criminal matter shall in all cases of appeal to Her Majesty conform to, execute, and carry into immediate effect such judgments and orders as Her Majesty in Council shall make thereupon in such manner and by such procedure as any original judgment, decree, or order of such Court can or may be executed.

COURTS ORDINANCE.

39. In all cases of appeal allowed by the Supreme Court or by Her Majesty, Her heirs, and successors, such Court shall, on the application and at the costs of the party or parties appellant, certify and transmit to Her said Majesty, Her heirs, and successors, in Her or Their Privy Council, a true and exact copy of all proceedings, evidence, judgments, decrees, and orders had or made in such causes so appealed, so far as the same have relation to the matter of appeal such copies to be certified under the seal of the said Court.

40. In all cases of appeal to Her Majesty, the Supreme Court and the original Court from which any such appeal was first taken shall conform to, execute, and carry into immediate effect such judgments and orders as Her Majesty in Council shall make thereupon, in such manner as any original judgment or decree of such Court can or may be executed.

APPEALS (PRIVY COUNCIL) ORDINANCE.

3. From and after the commencement of this Ordinance the right of parties to civil suits or actions in the Supreme Court to appeal to Her Majesty in Council against the judgments and orders of such Court shall the subject to and regulated by—

(*a*) the limitations and conditions prescribed by the rules set out in the Schedule, or by such other rules as may from time to time be made by Her Majesty in Council ; and

(*b*) such general rules and orders of Court as the Judges of the Supreme Court may from time to time make in exercise of any power conferred upon them by any enactment for the time being in force.

Present : **Herat, J.**

S. ISSADEEN *vs.* INSPECTOR OF POLICE, BADULLA*

S.C. 440/'63—*M.C. Badulla, Case No.* 32601.

Argued and decided on : 1st October, 1963.

Criminal Procedure Code, sections 151 (2) *and* 187 (1)—*Meaning of the word "forthwith" in section* 151 (2)—*Delay in recording evidence of person producing accused before Magistrate—Contravention of section* 151 (2) *read with section* 187 (1)—*Effect of such delay.*

Held : (1) That section 151 (2) of the Criminal Procedure Code requires that the Court should record the evidence of the person producing the accused, forthwith, *i.e.* at the time the person so producing the accused actually states to the Magistrate that he is producing the accused.

(2) That where there was a delay of four days between the production and the examination of the person who produced the accused, all subsequent proceedings should be quashed.

Nimal Senanayake, for the accused-appellant.

N. B. D. S. Wijesekera, Crown Counsel, for the Attorney-General.

* For Sinhala translation, see Sinhala section, Vol. 7 part 1, p. 1

HERAT, J.

Mr. Nimal Senanayake, on behalf of the accused-appellant, contends that the appellant was produced before the learned Magistrate by Police Sergeant Rajapakse under section 148 (1) (*d*) of the Criminal Procedure Code on the 6th October, 1961, and the learned Magistrate ordered bail and thereafter on the 10th of October, 1961, he recorded the evidence of Police Sergeant Rajapakse and proceeded to charge the accused.

Mr. Senanayake argues that section 151 (2) of the Criminal Procedure Code requires that the Court should record the evidence of the person producing the accused forthwith and he further argues that " forthwith " must be interpreted to mean " at the time the person so producing the accused actually states in Court before the Magistrate that he is producing the accused ". He says the reason for such an interpretation to be given to the word " forthwith " is that the Magistrate should be made aware of the circumstances that relate to the alleged charge so that the Magistrate may know if the accused has possibly committed an offence in order that he may not unnecessarily remand or bail out an innocent person.

I think this is a reasonable interpretation. In this case there was a delay of four days between the actual production and the examination of the person who produced the accused. There has been a contravention, therefore, of section 151 (2) which contravention, when read with section 187 (1) of the Criminal Procedure Code, renders all the subsequent proceedings vitiated.

I, therefore, set aside all these proceedings as well as the conviction and sentence and remit the case for fresh proceedings to be taken before another Magistrate with proper compliance of the provisions of section 151 of the Criminal Procedure Code.

Set aside and sent back.

Present : **L. B. de Silva, J.**

O. M. SALAHUDEEN *vs.* INSPECTOR OF POLICE, FORT*

S.C. 195/'63—*Joint Magistrate's Court, Colombo, Case No.* 25359.

Argued and decided on : May 22, 1963.

Control of Publication on Horse Racing Act, No. 44 *of* 1961—*Charge under section* 2 (*c*)—*Ingredients to be proved.*

Held : (1) That to establish a charge under section 2 (*c*) of the Control of Publication on Horse Racing Act No. 44 of 1961, the prosecution must prove : (*a*) that the accused distributed, sold or offered for sale a printed article ; (*b*) that the article in question was printed, published or communicated in breach of section 2 (*a*) or that it was imported in contravention of section 2 (*b*).

(2) That a publication or communication under section 2 (*a*) should be proved independently of the sale or distribution of the printed article to the decoy by the accused. Otherwise the accused should have been charged under section 2 (*a*).

P. Nagendran, for the accused-appellant.

W. K. Premaratne, Crown Counsel, for the Attorney-General.

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*For Sinhala Translation, see Sinhala section, Vol. 7 part 1, page 2

DE SILVA, J.

In this case the accused was charged with selling a printed article containing racing news connected with the running of horse races on a race meeting held outside Ceylon, *i.e.*, at Newbury in England in breach of section 2 (*c*) of the Control of Publication on Horse Racing Act, No. 44 of 61 and punishable under section 7 of that Act. To establish a charge under section 2 (*c*), the prosecution must prove that the accused distributed, sold or offered for sale a printed article. In this case I will assume that the prosecution has proved that the accused sold a printed article. Secondly, the prosecution has to prove that the article in question was printed, published or communicated in breach of section 2 (*a*) or that it was imported in contravention of section 2 (*b*). Apart from the evidence that the accused sold the printed article to the decoy sent by the Police Officers, there is no proof of the second ingredient necessary to establish this offence, namely, that the article was printed, published or communicated in Ceylon in breach of section 2 (*a*) or that it was imported in contravention of section 2 (*b*) of the Act. The very act of the sale by the accused to the decoy cannot be taken as proof of a publication or communication under section 2 (*a*). Such a publication or communication should be proved independently of the sale or distribution of the printed article by the accused to establish the charge under section 2 (*c*). Otherwise he should have been charged under section 2 (*a*). For this reason I hold that the prosecution has failed to establish the charge. It was also urged in appeal that the charge should fail on the ground of duplicity as it does not mention which limb of section 2 (*a*) or (*b*) the accused has contravened in committing this offence. There is justification in this case for this complaint. But it is not necessary to deal with this matter for the purposes of this appeal. The appeal is allowed and the accused is acquitted. The fine imposed on the accused is set aside.

Appeal allowed.

Present : **Herat, J.**

PONNUPULLE *vs.* OODOOWERRE TEA CO., LTD.*

S.C. No. 136/'61 *and S.C. No.* 216/'61—*C.R. Badulla, No.* 15887.

Argued and decided on : 14th February, 1963.

Ejectment, action for—Indian labourer employed in estate—Contract of labourer terminated—Right to occupy rooms given for occupation thereafter—Adequacy of notice to quit such room—What period of time would be reasonable ?

Held : (1) That the legal position of Indian labourers employed in tea or rubber estates in Ceylon, who are in such capacity given occupation of rooms in the cooly-lines belonging to the estate, is that one can imply a condition that although they can be ejected from the line-rooms they occupy, once their contract of labour is terminated they can be only so ejected after reasonable notice.

(2) That a period of, at least, three months' notice would be reasonable in their case.

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

G. T. Samarawickrema with *R. A. Kannangara*, for the plaintiff-respondent.

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*For Sinhala translation, see Sinhala Section, Vol. 7 part 1, p. 3

HERAT, J.

The appellant in this case was a labourer working on Oodoowerre Estate, of which the plaintiff-respondent is the owner. She belongs to that class of labour employed mainly on tea and rubber estates known as Indian labour. Admittedly her services as a labourer were terminated, and as regards the grounds for that termination they are not in dispute in this case and are irrelevant for the decision of this appeal. By reason of the fact that she was a labourer on this estate she was given occupation of room No. 3 in one of the cooly lines belonging to the estate. Owing to the termination of her employment as a labourer, the Superintendent of the estate as agent of the plaintiff-respondent Company gave her 12 days' notice to vacate the room she occupied and give possession thereof to the estate authorities. On her failing to do so the present action was filed against the appellant in the Court of Requests of Badulla seeking to have her ejected. The learned Commissioner of Requests of Badulla has ordered her ejectment. She has appealed from that order to this Court.

I am called upon to analyse what the defendant's legal position is as far as her occupation of the line-room in question is concerned. No doubt, along with her contract of employment as a labourer on the estate there is a subsidiary contract between the Company, on the one hand, and herself as a labourer, on the other, by which the Company agrees to give her occupation of a line-room in her capacity as a labourer on the estate. She is not a tenant, but only a licensee. But even so, this contract of license relating to the occupation of this line-room must be legally analysed. It is a right to occupy the line-room, in her capacity as a labourer on the estate. No doubt, if she ceases to be a labourer she cannot claim to continue to have the right to occupy that room. But as far as this contract of license is concerned, are there not any other terms which according to the circumstances existing at the time of the contract can be implied into it. These Indian labourers are not of the same type as the ordinary type of labour one finds in the country. They are strangers in the land in which they reside. They have no homes of their own. Very often they cannot return to the land of their origin. If they are to be turned away summarily and thrown on the road their position, indeed, would be pitiable. Even their right to obtain their rice ration is attached to an issue of that ration from the particular estate on which they are employed. In these circumstances, I think the legal position is that one can imply a condition that although they can be ejected from the line-rooms they occupy once their contract of labour is terminated, they can be only so ejected after reasonable notice is given. A period of 12 days which was the notice given to this appellant can scarcely be said to be reasonable in the circumstances of this case. Taking into account all the circumstances of this case, and in particular the conditions under which Indian labour suffers in this country, I think a period of, at least, three months would be reasonable notice.

I therefore hold that other order ejecting the appellant is illegal as her right to occupy the line-room in question has not been legally terminated by reason of the fact that reasonable notice has not been given.

I therefore allow the appeal of the appellant and set aside the order of ejectment. The appeal is allowed with costs.

Appeal allowed.

Present : **Sansoni, J. and L. B. de Silva, J.**

B. M. CHARLESHAMY *vs.* P. H. CARLINA *alias* CHALINA & OTHERS

S.C. No. 643/60 (*F*)—*D.C. Galle, Case No.* 6048.

Argued on : March 14, 1963.
Delivered on : March 22, 1963.

Fideicommissum—Deed of gift creating a "fideicommissum"—Gift in favour of particular members of a family—Not accepted by the "fidei commissaries"—Revocability by donor.

Where a deed of donation creates a *fidei commissum* in favour of particular members of a family, as distinguished from *fidei commissum* in favour of a family as a class, and the donation is accepted by the *fiduciaries*, but not by the *fidei commissaries*, it is open to the donor to revoke the gift so far as it relates to the *fidei commissaries* and their children.

Followed : *Pakirmuhaiyadeen* v. *Asia Umma*, 57 N.L.R. 449.

Distinguished : *Abeywardena* v. *West*, 58 N.L.R. 313 (P.C.).LIV C.L.W 33

C. Ranganathan with *Walter Widyaratne*, for the plaintiff-appellant.

E. B. Wikramanayake, Q.C., with *N. E. Weerasooria (Jnr.)*, for the defendants-respondents.

SANSONI, J.

The plaintiff sued for declaration of title in respect of a land which formerly belonged to one Lusina. She gifted the land by deed P 1 of 1945 to Carlina (1st defendant) and Carlina's husband, Emanis (4th defendant) subject to a *fidei commissum* in favour of their two sons, Dharmadasa and Piyadasa (2nd and 3rd defendants) and their lawful children.

The gift was accepted by the two fiduciaries ; but it was not accepted by the *fidei commissaries* either at the time of the making of the gift or subsequently. Since this was not a *fidei commissum* in favour of a family, it was open to the donor, in view of the non-acceptance by the *fidei commissaries*, to revoke the gift so far as it related to the *fidei commissaries* and their children—see *Packirmuhaiyadeen* v. *Asia Umma*, (1956) 57 N.L.R. p. 449. In 1951 the donor, Lusina, by deed P 2, to which Carlina, Emanis, Dharmadasa and Piyadasa were parties, revoked the earlier deed of gift P 1 and Emanis, Carlina, Dharmadasa and Piyadasa renounced all their right, title, interest and claim, if any, under that deed of gift. This deed P 2 had the effect of revesting the title in Lusina.

The next transaction was a gift by Lusina to Carlina alone (P 3 of 1951), after which Carlina, Dharmadasa and Piyadasa by deed P 4 of 1953 transferred the land to the plaintiff reserving to themselves the right to obtain a re-transfer on payment of Rs. 5,000/- and interest at 12% within a period of five years. That period elapsed without any reconveyance being obtained and the plaintiff brought this action against the three vendors for declaration of title, ejectment and damages. The 4th defendant, Emanis, was later added as a party. The plaintiff's action was dismissed by the learned District Judge and he has appealed.

It seems to me that the appeal must succeed because the deed P 1 of 1945 was effectively revoked by Lusina. Mr. Wikramanayake sought to support the judgment by relying on the case of *Abeywardene* v. *West*, (1957) 58 N.L.R., p. 313. He argued that acceptance by the fiduciaries was sufficient acceptance to make the *fidei commissum* valid and binding in favour of the children of Dharmadasa and Piyadasa and to render the gift irrevocable. I do not agree that this decision is in point. It dealt with a *fidei commissum* in favour of a family as a class, and not a *fidei commissum* in favour of particular members of a family, which is the case we are dealing with. That difference makes the Privy Council decision inapplicable.

I would, therefore, hold that in view of the non-acceptance by the *fidei commissaries*, it was open to the donor to revoke the gift so far as they and their children were concerned. When the *fidei commissaries* and the fiduciaries renounced their rights, if any, in favour of the donor, who contemporaneously revoked the gift, there was nothing left to any of the defendants. Con-

sequently, the subsequent transactions were valid and the plaintiff became the owner absolutely at the expiry of five years from the date of his purchase.

I would set aside the judgment under appeal and give judgment for the plaintiff as prayed for with costs in both Courts, save that damages will be at the agreed rate of Rs. 20/- per month from the date of action.

L. B. DE SILVA, J.

I agree.

Appeal allowed.

Present : **T. S. Fernando, J.**

K. THIYAGARAJAH *vs.* C. NAVARATNAM, SUB-INSPECTOR OF POLICE, BORELLA.

S.C. No. 919 *of* 1962—*M.C. Colombo, No.* 10029/*B.*

Argued on : 8th April, 1963.
Decided on : 6th May, 1963.

Trade Marks—Similarity of device—Whether calculated to deceive—Merchandise Marks Ordinance, section 2.

The accused, a manufacturer of aerated waters, was convicted of having in his possession for sale or any purpose of trade, bottles of aerated water to which had been falsely applied a trade mark so nearly resembling the trade mark of the Ceylon Cold Stores, Ltd., as to be calculated to deceive.

It was in evidence that both manufacturers offered to the public a drink known as " Lanka Orange ". The labels on both brands contained a representation of an orange in an orange colour on a green background.

The dissimilarities were as follows :—

(*a*) The labels on the bottles of Ceylon Cold Stores, Ltd., contained the representation of an elephant, the expression " Elephant Brand " and the name " Ceylon Cold Stores, Ltd." .

(*b*) The labels on the bottles of the second contained the representation of the lotus flower, the expression " Lotus Brand " and the name " Dominion Aerated Water Co., 20/1, Rodney Street, Colombo ".

Held : That the accused had not possessed goods to which a trade mark so nearly resembling the trade mark of the Ceylon Cold Stores, Ltd., as to be calculated to deceive had been falsely applied.

The following dicta of MacDonnel, C.J., in *Sahib* v. *Muthalip*, (34 N.L.R., at 235), was quoted with approval :—

" To establish that a mark is calculated to deceive, it is not necessary to show that there was any intent on the part of the person using the mark to deceive anyone, though this may be an element in the question. What is meant is that there is something in the mark itself, something objective, which is apt to deceive. You look to the mark itself, to what it is, to what it looks like, to what it contains, and to how it compares with the other trade mark put forward, and if there is in the mark itself something that is likely to deceive buyers or users of the article on which it is placed, then the mark is calculated to deceive whatever may have been the intent or absence of one on the part of the person using it."

Case referred to : *Sahib* v. *Muthalip*, (1932) 34 N.L.R. 235.

G. E. Chitty, Q.C., with *Ananda Karunatilleke* and *E. B. Vannitamby*, for the accused-appellant.

A. A. de Silva, Crown Counsel, for the Attorney-General.

T. S. FERNANDO, J.

The accused appeals from a conviction and a sentence of six weeks' rigorous imprisonment imposed on him in respect of a charge of " having in his possession for sale or any purpose of trade 42 bottles of aerated water said to contain ' Lanka Orange ' to which had been falsely applied a trade mark so nearly resembling trade mark No. 16816 which is the property of the Ceylon Cold Stores,

Ltd., as to be calculated to deceive " and thereby committing an offence in breach of section 2 (2) of the Merchandise Marks Ordinance (Cap. 151), punishable under section 2 (4) of the same Ordinance.

The accused himself is a manufacturer of aerated waters and is the registered proprietor of a trade mark—No. 10567—in respect of aerated waters. The bottles found in the possession of the accused bore labels representing that the bottles contained a drink popularly known as Lanka Orange. The labels also contained a representation of an orange. A drink called Lanka Orange manufactured by the Ceylon Cold Stores, Ltd., is also sold by that company in bottles bearing labels containing a representation of an orange. The labels on both brands (those of the accused as well as those of the Ceylon Cold Stores) have a green background, while the fruit is not unnaturally represented in an orange colour. It is in evidence—*vide* document P 32—that the registration of trade mark No. 16816 gave its holder no right to the exclusive use of the words " Lanka Orange " or to the device of the orange. A witness for the prosecution also conceded that no particular colour has been protected by registration of trade mark No. 16816.

In the circumstances I have set out above one has to examine whether the accused has applied to the labels on his bottles any other part of the registered trade mark No. 16816. There are only three other parts of that mark that remain to be so examined, viz., the mark, the name of the brand and the name of the company. These are, respectively, the representation of an elephant the expression " Elephant Brand " and the name " Ceylon Cold Stores, Ltd.". The corresponding parts of the labels on the bottles in the possession of the accused are, respectively, the representation of the lotus flower, the expression " Lotus Brand " and the name " Dominion Aerated Water Co., 20/1, Rodney Street, Colombo 8 ". The three parts in one label, with all respect to the learned Magistrate who appears to have reached a different conclusion, appear to me to be completely different from the three corresponding parts in the other label. Could a person looking at the bottles put out by the accused as Lanka Orange be deceived into the belief that he is looking at Lanka Orange which is the product of the Ceylon Cold Stores, Ltd. ? " To establish that a mark is calculated to deceive ", said MacDonall, C.J., in *Sahib* v. *Mutha lip*, (1932) 34 N.L.R at p. 235, "it is not necessary to show that there was any intent on the part of the person using the mark to deceive anyone, though this may be an element in the question. What is meant is that there is something in the mark itself, something objective, which is apt to deceive. You look to the mark itself, to what it is, to what it looks like, to what it contains, and to how it compares with the other trade mark put forward, and if there is in the mark itself something that is likely to deceive buyers or users of the article on which it is placed, then the mark is calculated to deceive whatever may have been the intent or absence of one on the part of the person using it ". If a person cannot read English and wishes to buy Lanka Orange manufactured by Ceylon Cold Stores, Ltd., it is reasonable to think he will look in the label for the representation of the elephant. He will not see it in the labels of the bottles of the accused. If a person has the advantage of being able to read English he can see, in addition, the expression " Lotus Brand " which appears prominently at the top of the label and the name of the accused's company which appears, also somewhat prominently, at the bottom of the label. I think one is compelled in these circumstances to conclude that the accused had not possessed goods to which a trade mark so nearly resembling trade mark No. 16816 as to be calculated to deceive had been falsely applied.

The conviction and sentence are hereby quashed.

Appeal allowed.

Privy Council Appeal, No. 43 of 1962.

Present : **Viscount Radcliffe, Lord Evershed, Lord Morris of Borth-Y-Gest, Lord Devlin, Sir Kenneth Gresson.**

ASOKA KUMAR DAVID ALSO KNOWN AS DAVID ASOKA KUMAR

vs.

M. A. M. M. ABDUL CADER

From

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

DELIVERED THE 2ND JULY, 1963.

Urban Councils Ordinance (Cap. 255)—Chairman's statutory power of granting licences—Statutory power vested in a public authority—Malicious misuse of—Whether there is a right to recover damages—Delict—Roman-Dutch Law.

Issues—Disposal of preliminary issues before hearing of evidence—Proper occasion for allowing such procedure.

Under the Urban Councils Ordinance (Cap. 255) the respondent as Chairman of the Urban Council of Puttalam had power to issue or refuse licences under the Public Performances Ordinance (Cap. 134). The appellant, who was the proprietor of a cinema at Puttalam, sued the respondent, and in his plaint alleged that he had duly applied to the respondent for a licence for his cinema ; that the cinema was in a fit and proper building suitable for public performances ; that he had paid the fee for the licence ; that he had fulfiled all necessary and/or reasonable conditions entitling him to the issue of a licence ; but that nevertheless the respondent had wrongfully and maliciously refused and neglected to issue the required licence to the appellant's loss and damage which he estimated at Rs. 35,000/-. The respondent, in his answer, pleaded specifically that the plaint disclosed no cause of action against him and raised it as a preliminary issue which would dispose of the whole action.

The District Judge heard legal argument on that issue alone, and, without hearing any evidence, dismissed the appellant's action on the ground that, as the respondent was acting as Chairman of the Urban Council in the matter of the licence, he could not be sued " in his private capacity for something he had done in his capacity as the Chief Executive Officer of the Urban Council of Puttalam ".

Held : (1) That under the Urban Councils Ordinance, the Chairman is himself the local authority for granting of licences for cinema performances, that this power was his responsibility alone and not that of the Council, and that, therefore, the appellant's action could not be considered defective on that ground.

The Supreme Court did not express any view as to the validity of the point that had succeeded in the District Court, but held that the plaint disclosed no cause of action on a different ground. The Supreme Court adopted the view that for an action in delict to succeed there must have been an infringement of a legal right, that the appellant had no such right, since under the statute he was not entitled to exhibit cinematographs without the licence of the Chairman, and it had been left to the discretion of the Chairman, whether to grant or withhold the licence. In the opinion of the Supreme Court, even if the Chairman had acted maliciously in withholding the licence, no right of the appellant had been infringed, and his proper and only remedy was to apply for a writ of mandamus to ensure that his application was duly heard and determined.

Held : (2) That the question to be determined was not what rights the appellant had without a licence, but rather what rights were created between these two parties by the relationship under which the appellant wished to operate a cinema and had applied for a licence to do so, and that the respondent had the statutory responsibility for deciding how to deal with that application. If the facts alleged by the appellant in the plaint were true, it was impossible to say, without investigating the facts, that the respondent did not owe some duty to the appellant with regard to the execution of his statutory power ; and if, as pleaded, he had been malicious in refusing to grant the licence, it was equally impossible to say, without investigating facts, that there could not have been a breach of a duty giving rise to a claim for damages. For these reasons the action was not one that could justly be disposed of on preliminary issues argued in advance of the hearing of the evidence.

Per THE JUDICIAL COMMITTEE:—(*a*) "The issue remains what it has been from the beginning, a question of liability dependent directly upon the Roman-Dutch law of delict and only indirectly and by way of an alogy and illustration upon the English law of torts. Such consultations as Their Lordships have thought it wise to make of the institutional writers on the Roman-Dutch Law, Voet, Lee, and Wille, have not led them to think that the conceptions of that law would regard as necessarily inadmissible a right of compensation to a plaintiff for a malicious invasion of his statutory 'rights' to have his claim to a licence subjected to a *bona fide* determination by a public authority".

(*b*) "Useful as the argument of preliminary issues can be when their determination can safely be foreseen as conclusive of the whole action in which they arise, experience shows that very great care is needed in the selection of the proper occasion for allowing such procedure. Otherwise the hoped for shortening of proceedings and saving costs may prove in the end to have only the contrary effect to that which is intended. This, unfortunately, is one of such cases".

Distinguished : *Davis* v. *Mayor, etc., of the Borough of Bromley*, (1908) 1 K.B. 170. ; 97 L.T. 705 ; 24 T.L.R. 11

E. F. N. Gratiaen, Q.C. with *Dick Taverne* for the plaintiff-appellant.

No appearance for the defendant-respondent

VISCOUNT RADCLIFFE

This is an appeal from a judgment of the Supreme Court of Ceylon, dated 24th March, 1961, which rejected an appeal of the appellant against a judgment of the District Court of Puttalam, dated 17th March, 1960. By that judgment the District Court had dismissed an action instituted by him against the respondent claiming damages for an alleged delict.

The decision in favour of the respondent was given on the basis of two issues which, by agreement of counsel at the trial, were determined as preliminary issues before the full hearing of the case. The learned Judge in the District Court answered both issues against the appellant, and the Supreme Court upheld his decision, though on quite a different point. The respondent has not been represented before the Board. For the reasons which will appear later they have come to the opinion that the action is not one which can properly be disposed of on preliminary points of law in advance of evidence, and they will advise Her Majesty accordingly. Since, therefore, the action must go back to the District Court for trial, it is desirable that only the minimum necessary to deal with the matter should be said at this stage.

The issues between the appellant and the respondent are set out in their respective pleadings. By his plaint the appellant sets out (paragraph 2) that he was at all material times the proprietor of a cinema at Puttalam ; that (paragraph 3) the respondent was at all material times the Chairman of the Urban Council of Puttalam and as such the local authority responsible for the issue of licences under the Rules made under the Public Performances Ordinance (Cap. 134) ; that (paragraph 4) the appellant duly applied to the respondent for a licence for his cinema under the Rules ; that (paragraph 5) the cinema was in all respects a fit and proper building suitable for public performances, and the appellant had paid the necessary fee for the licence and had fulfilled all necessary and/or reasonable conditions entitling him to the issue of a licence ; that (paragraph 6) the respondent had nevertheless wrongfully and maliciously refused and neglected to issue the required licence. The appellant concluded by claiming Rs. 35,000 as damages and a further sum for continuing damage.

The respondent's answer contained the specific plea in limine that the plaint disclosed no cause of action against him. Subject and without prejudice to that plea, he admitted that he was at all material times the Chairman of the Puttalam Urban Council and that the Chairman, *ex-officio*, as the executive officer of the Council was the local authority to whom application had to be made for the issue of the licence. Apart from this admission, the answer in effect denied the rest of the averments of the plaint and stated (paragraph 7) that a licence was issued to the appellant but that he refused to accept it by reason of conditions that were lawfully and properly inserted therein.

When the action was opened in the District Court the appellant's counsel proposed the following issues :—

(1) Is and was the plaintiff at all material times the proprietor of the cinema (the Gardiner Theatre, Puttalam) ?

(2) Did the plaintiff by two letters referred to in his plaint duly apply for a public performance licence for his cinema ?

(3) Did the defendant wrongfully and maliciously refuse and neglect to issue the licence ?

(4) If issues 1, 2 and 3 are answered in the affirmative, what damages is the plaintiff entitled to ?

The respondent's counsel then proposed to add two further issues :—

(5) Does the plaint disclose a cause of action against the defendant ?

(6) If not, can the plaintiff maintain this action ?

He further moved that these two issues should be argued first as they affected the entire action. The appellant's advocate made no objection to this and the District Judge proceeded to hear arguments on them alone and to give judgment on them as preliminary issues.

The effect of his judgment, which was delivered on the 17th March, 1960, was to reject the respondent's argument that the local authority had an absolute discretion to grant or withhold licences and its decision could not be challenged in a Court of law, but to uphold an argument that, as the respondent was acting as Chairman of the Urban Council in the matter of the licence, he could not be sued " in his private capacity for something he has done in his capacity as the Chief Executive officer of the Urban Council, Puttalam ".

The respondent was named in the plaint as " M. A. M. M. Abdul Cader, ' Haniffa Villa ', Puttalam ", Haniffa Villa being presumably his private residence. The Judge held that as the plaint did not disclose a cause of action against him in his private capacity, he must answer No to both issues 5 and 6, and dismiss the action with costs.

The judgment of the Supreme Court (De Silva and Tambiah, J.J.), proceeded on different lines. It did not express any view as to the validity of the point that had succeeded with the trial Judge, but accepted the proposition that a plaintiff could not maintain any right of action for damages in respect of a refusal or failure to grant a licence of the kind involved in this case, even though the licensing authority had acted maliciously in withholding the licence. In the opinion of the Court no right of the plaintiff could be said to have been infringed in such circumstances and his proper and only remedy was to apply for the issue of the prerogative writ of mandamus to ensure that his application was duly heard and determined. The Court's decision was expressly based upon the English authority, *Davis* v. *Mayor, etc., of the Borough of Bromley*, (1908) 1 K.B. 170, a case the facts of which were very similar to those pleaded in the present proceedings.

Before Their Lordships the appellant challenged both judgments delivered in Ceylon as unsupportable in law. It is convenient to say at once that in their opinion the point upon which the District Judge dismissed the action is misconceived. Under the Urban Councils Ordinance (C. 255) the Chairman is himself, as the pleadings have recognised, the local authority in connection with the granting of licences for cinema performances. The granting or withholding of such licences is his personal responsibility, and his acts are not those of the Council, which is a corporation, nor is he a corporation for the purpose of these duties. It follows that, if the law does recognise a right of action against him in any circumstances arising out of a breach of those duties, whether or not a breach accompanied by bad faith or malice, the only way in which he can be sued is as an individual person, and there is no relevant distinction in his status as a party between his official capacity and his personal capacity. In Their Lordships' opinion the appellant's action cannot be treated as defective on such a ground.

The argument accepted by the Supreme Court raises a different issue. The judgment adopts the view that for an action in delict to succeed and afford a right to damages there must have been an infringement of an antecedent legal right of the person injured. The appellant, it appeared

to the Court, had no such right, since under the governing statute he was not entitled to exhibit cinematographs in his building without the licence of the local authority, and it had been left to the discretion of the Chairman of the local Council to decide whether to grant or to withhold the necessary licence.

If they were to regard this as a proposition equally valid for the English law of tort as for the Roman-Dutch law of delict (and the Supreme Court judgment relies exclusively on the authority of decisions in the English Courts) Their Lordships would have great difficulty in upholding it in so general a form. It does not appear to them that a right to damages is excluded by the mere circumstance that the appellant could not lawfully operate his cinema without a licence. Plainly the law forbade his doing so. But the question to be determined is not what rights he had without a licence but rather what rights were created between these two parties by the relationship under which one wished to operate a cinema and had applied for a licence to do so and the other had the statutory responsibility for deciding how to deal with that application. Whatever the limits of the range of the latter's discretion in carrying out that responsibility, a separate question which would need careful consideration if the action came to be tried, the appellant has at any rate pleaded that he had done everything required to qualify him for the grant of a licence and that he was entitled to have one issued. Given that relationship and the assumption of that state of facts, it seems to Their Lordships impossible to say that the respondent did not owe some duty to the appellant with regard to the execution of his statutory power ; and if, as pleaded, he had been malicious in refusing or neglecting to grant the licence, it is equally impossible to say without investigation of the facts that there cannot have been a breach of duty giving rise to a claim for damages.

The Supreme Court's opinion was based on the decision of the English Court of Appeal in *David* v. *Bromley* (*supra*), a decision which they presumably regarded as satisfactorily illustrative of the principles of the Roman-Dutch law of delict. The facts, indeed, of the *Davis* case were closely similar to those pleaded here. There, too, a licence or statutory approval had been sought from and refused by a local authority, and the applicant issued a writ alleging that the authority had not acted *bona fide* in rejecting his plans but from motives of spite and claiming a declaration that he was entitled to carry out his proposed works and damages for the refusal. The judgment of the Court, which is shortly expressed, is to the effect that no action would lie in these circumstances ; that the possible indirect motives attributed to the defendants could not render the exercise of their statutory discretion the more susceptible to judicial review than it would be otherwise ; and that the plaintiff's only remedy, if the defendants had really made no true or *bona fide* exercise of their authority, was to apply for a mandamus to have his application properly heard and determined.

Davis's case was decided in the year 1907. Since then the English Courts have had to give much consideration to the general question of the rights of the individual dependent upon the exercise of statutory powers by a public authority, and the decision of that case would now have to be seen in the context of a very great number of later decisions that have dealt with the question at more length and with more elaboration. In their Lordships' opinion it would not be correct today to treat it as establishing any wide general principle in this field : certainly it would not be correct to treat it as sufficient to found the proposition, as asserted here, that an applicant for a statutory licence can in no circumstances have a right to damages if there has been a malicious misuse of the statutory power to grant the licence. Much must turn in such cases on what may prove to be the facts of the alleged misuse and in what the malice is found to consist. The presence of spite or ill-will may be insufficient in itself to render actionable a decision which has been based on unexceptionable grounds of consideration and has not been vitiated by the badness of the motive. But a " malicious " misuse of authority, such as is pleaded by the appellant in his plaint, may cover a set of circumstances which go beyond the mere presence of ill-will, and in their Lordships' view it is only after the facts of malice relied upon by a plaintiff have been properly ascertained that it is possible to say in a case of this sort whether or not there has been any actionable breach of duty.

These reasons have forced their Lordships to conclude that this action is not appropriately disposed of by argument upon the two preliminary issues by which it has so far been judged. The position, as they see it, is this. It has been dismissed in the District Court upon a ground which is not maintainable in law. It has been dismissed in the Supreme Court in reliance upon a general principle derived from certain English authorities

which Their Lordships regard as too widely stated to afford a satisfactory conclusion of the pleadings as they stand. The issue remains what it has been from the beginning, a question of liability dependent directly upon the Roman-Dutch law of delict and only indirectly and by way of analogy and illustration upon the English law of torts. Such consultation as their Lordships have thought it wise to make of the institutional writers on Roman-Dutch Law, Voet, Lee and Wille, has not led them to think that the conceptions of that law would regard as necessarily inadmissible a right of compensation to a plaintiff for a malicious invasion of his statutory "rights" to have his claim to a licence subjected to *bona fide* determination by a public authority. In view of the order that they propose to advise and the fact that this aspect of the parties' rights and liabilities under the Roman-Dutch law has not been accorded any express treatment in the judgments of the Courts in Ceylon, their Lordships think that it would be inappropriate for them to say anything more about the merits in law of this appeal than that they could not dismiss it with any confidence that the appellant's case, as pleaded, has as yet received the full consideration that is required for a final determination of the case.

In their opinion, for the reasons stated above, this action is not one that can justly be disposed of on preliminary issues argued in advance of the hearing of evidence. Useful as the argument of preliminary issues can be when their determination can safely be foreseen as conclusive of the whole action in which they arise, experience shows that very great care is needed in the selection of the proper occasion for allowing such procedure. Otherwise the hoped-for shortening of proceedings and saving of costs may prove in the end to have only the contrary effect to that which is intended. This, unfortunately, is one of such cases.

Their Lordships will humbly advise Her Majesty that the appeal be allowed and the Order of the District Court, dated 17th March, 1960, and the Order of the Supreme Court, dated 24th March, 1961, be reversed. In lieu thereof they advise that the action should be remitted to the District Court with a direction that it should proceed to trial and that the six issues raised by the parties should be answered by the Judge at the conclusion of the hearing. Since the appellant agreed to the procedure of treating issues 5 and 6 as preliminary points and made no objection to it on the appeal to the Supreme Court he should pay the respondent's costs of the hearings in both those Courts in any event.

Their Lordships make no order as to the costs of the appeal to the Board.

Appeal allowed.

Present : **T. S. Fernando, J.**

P. ASEERVATHAM *vs.* T. KANDIAH, SUB-INSPECTOR OF POLICE, ANNAICOTTAI

S.C. No. 946 *of* 1961—*M.C., Jaffna, No.* 21325.

Argued on : 3rd November, 1961.
Decided on : 23rd November, 1961.

Criminal Procedure Code, sections 151 (2) *and* 187 (1)—*Accused present otherwise than on summons or warrant—Inquiry by Magistrate prior to framing of charge—Police Officer who produced accused not examined—Meaning of word "forthwith" in section* 151 (2).

Where an accused appears before a Magistrate otherwise than on summons or warrant, and it, therefore, becomes incumbent on the Magistrate under section 187 (1) of the Criminal Procedure Code to conduct the examination directed section 151 (2) of the said Code—

Held : (1) That there is no imperative provision of law requiring the Magistrate to examine the Police Officer himself who produces the accused.

(2) That " forthwith " in section 151 (2) does not mean that the examination should be conducted on the first day on which the accused is brought before Court. In any event, in the present case there had only been at the most an ommission or irregularity which had not occasioned failure of justice.

Case referred to : *Tikiri Banda* v. *Perimpanayagam*, (1959) 61 N.L.R. 286; LVII C.L.W. 65.

N. Kasiraja, for the accused-appellant.

T. Dias Bandaranaike, Crown Counsel, for the Attorney-General.

T. S. FERNANDO, J.

The Magistrate tried a charge in respect of an offence punishable under section 317 of the Penal Code summarily in terms of section 152 (3) of the Criminal Procedure Code, found the charge proved, convicted the accused and sentenced him to undergo nine months' rigorous imprisonment. The evidence amply bears out the accused's guilt, but learned counsel on his behalf has questioned the legality of the trial.

The argument for the accused-appellant is based on the contention that this was a case where the accused appeared before the Magistrate otherwise than on summons or warrant and that, therefore, in terms of section 187 (1) of the Procedure Code, it was incumbent on the Magistrate to conduct the examination directed by section 151 (2). I must point out that the learned Magistrate framed a charge against the accused only on 14th March, 1961, and this he did after examination of (*a*) the injured person who testified it was the accused who cut her, and (*b*) the doctor who examined her injuries. In regard to this it is argued that there was no sufficient examination as contemplated by section 151 (2) in that the police officer who brought the accused to Court was not himself examined. The case of *Tikiri Banda* v. *Perimpanayagam*, (1959) 61 N.L.R. at 286, did not decide that it was obligatory for the police officer who brings the accused to Court to be examined. As I read the decision in that case, the learned judge who decided it only held that the requirement of an examination of persons to speak to the facts of a case excluded hearsay statements being acted upon. This decision has now been examined by a Divisional Bench of this Court and the judgment of that Bench is awaited. In regard, however, to the question whether the police officer himself must be examined it seems to be that there is no imperative provision of the law requiring the Magistrate to do so.

Next, it was contended that the examination contemplated by section 151 (2) must be conducted forthwith, and it was submitted that, therefore, in this case such an examination should have been held on 28th February, 1961, which was the first day on which the accused was brought before Court otherwise than on summons or warrant, and not on the next day (14th March, 1961) which day was fixed by the Magistrate for leading evidence. I am unable to agree that " forthwith " in this section necessarily bears the meaning contended for on behalf of the accused. There has at the most been an omission or irregularity which has occasioned no failure of justice.

I would dismiss the appeal.

Appeal dismissed.

Present : **Herat, J.**

ASILIN & ANOTHER *vs.* INSPECTOR OF POLICE, MARADANA

S.C. 353/'63—*M.M.C., Colombo, No.* 84947/*M.*

Argued and decided on : 11th September, 1963.

Criminal Procedure Code, sections 151 (2) *and* 187 (1)—*Accused person produced before Magistrate otherwise than by summons or warrant—Failure to record evidence before framing charge—Subsequent service of summons in course of proceedings—Does it cure the omission.*

Held : That where an accused has not been initially produced before a Magistrate, either by way of summons or warrant, the subsequent serving of summons in the course of proceedings does not do away with the necessity of recording evidence before framing a charge as required by sections 151 (2) and 187 (1) of the Criminal Procedure Code.

Cases referred to : *Mohideen* v. *Inspector of Police, Pettah*, (1957) 59 N.L.R. 217 ; LV C.L.W. 12
Appuhamy v. *S.I. Police, Jaffna*, (1962) 64 N.L.R. 34 ; LXI C.L.W. 91
Nadar v. *Liyanage*, 64 N.L.R 526
Krishnapillai v. *Inspector of Police, Crimes*, (1960) 61 N.L.R. 499

Maureen Seneviratne with *Ratna de Zoysa*, for the 2nd accused-appellant.

N. B. D. S. Wijesekera, Crown Counsel, for the Attorney-General.

HERAT, J.

Learned Counsel for the 2nd accused-appellant, Miss Maureen Seneviratne, takes a preliminary point of objection to the conviction of her client. She states that the 2nd accused-appellant was not produced before Court either by way of summons or warrant and that after examination, it was imperative upon the learned Magistrate to record evidence against her showing her implication in the offence alleged before framing a charge against her, *vide* sections 151 (2) and 187 (1) of the Criminal Procedure Code, Chapter 20. She cites the cases decided by this Court in 59 N.L.R., page 217, 64 N.L.R., page 34 and 64 N.L.R., page 526 to the effect that failure to do so renders a conviction void and requires the case to be sent back by this Court to the Magistrate's Court for fresh proceedings to be taken. Learned Crown Counsel very correctly admits this, but points out that at a certain stage in the proceedings, after this particular accused had been produced in Court otherwise than by way of summons or warrant, summons, in fact, was served on her in Court by the learned Magistrate. To this position Miss Seneviratne quickly springs to the charge. She cites the judgment of Mr. Justice Sinnetamby, reported in 61 N.L.R., at page 499, that the subsequent serving of summons in the course of the proceedings by the learned Magistrate, where the accused has not been initially produced either by way of summons or warrant, does not do away with the necessity of recording evidence before framing a charge as stipulated by sections 151 (2) and 187 (1) of the Criminal Procedure Code. Learned Crown Counsel is forced to admit the strength of this submission. I, too, agree with Miss Seneviratne's submissions and respectfully follow the view taken by Mr. Justice Sinnatamby in the case quoted above. For these reasons I quash the conviction of the 2nd accused-appellant and remit the case to the Municipal Magistrate's Court of Colombo for fresh proceedings to be taken against the, second accused-appellant as well as the first accused who, although he has not appealed, has his conviction also affected by the same defect. Now that the matter has been brought to my notice by learned Crown Counsel, I set aside the conviction of the first accused by way of revision for the reasons I have already given and direct fresh proceedings to be taken against him also.

Set aside and sent back.

Present : **Abeyesundere, J.**

LOKU BANDA *vs.* ASSISTANT COMMISSIONER OF AGRARIAN SERVICES, KANDY*

S.C. 236/'63—*M.C. Kandy*, 27850.

Argued on : 4th and 5th September, 1963.
Decided on : October 1st, 1963.

Paddy Lands Act, No. 1 *of* 1958—*Inquiry under section* 3 (2) *by Assistant Commissioner of Agrarian Services—Order under section* 3 (3) (*b*) *for eviction—Report by another Assistant Commissioner to Magistrate under section* 21 (1) *praying for an order of eviction against appellant—Order by Magistrate for eviction of appellant after hearing him—Duty of Commissioner to satisfy Magistrate that order for eviction under section* 3 (3) (*b*) *was legally made—How may this be done ?—Burden on appellant to show cause why he should not be evicted—How he can discharge such burden ?*

The applicant, an Assistant Commissioner of Agrarian Services, presented to the Magistrate a report under section 21 (1) of the Paddy Lands Act, praying for an order to evict the appellant, who, he stated, had failed to vacate a paddy field notwithstanding an order made under section 3 (3) (*b*) of the Act, after an inquiry held under section 3 (2) of the Act.

*For Sinhala translation, see Sinhala section, Vol. 7 part 2, p. 5

The appellant appeared before the Magistrate in obedience to the summons issued and showed cause against the eviction. The learned Magistrate, however, held :—

(i) that he was " satisfied that the complainant has taken all the requisite steps under the Act " ;

(ii) that the appellant had failed to show that he is entitled to occupy the paddy land in question, and granted the order for eviction prayed for.

It was contended in appeal—

(*a*) that the aforesaid order under section 3 (3) (*b*) to vacate the field was made by the applicant's predecessor, and not by the applicant ;

(*b*) that the learned Magistrate should have satisfied himself before he made the order of eviction that the order of the Assistant Commissioner under section 3 (3) (*b*) was valid ;

(*c*) that the burden of proving the validity of the order of the said Commissioner was on the applicant and that he had failed to prove some of the facts necessary for enabling the Commissioner to assume jurisdiction to make the order under section 3 (3) (*b*).

Held : (1) That before making the order for eviction under section 21 (1), the Magistrate should have satisfied himself that the Assistant Commissioner, who made the order under section 3 (3) (*b*) had jurisdiction to make such order.

(2) That the burden of showing cause why he should not be evicted was on the appellant.

(3) That the appellant had shown good cause by establishing from facts elicited in cross-examination of the prosecution witnesses that the evidence placed before the Court was not sufficient to vest the Assistant Commissioner with jurisdiction to make a legal order under section 3 (3) (*b*).

(4) That, therefore, it cannot be held that the applicant satisfied the Court that the aforesaid Assistant Commissioner's order was legally made.

Per ABEYSUNDERE, J.—" The principle that may be deduced from the decisions in the aforesaid three reported cases is that where an order that is not made by a Court is sought to be enforced by a Court under any written law, the Court must be satisfied that such order is valid and the party affected by such order is entitled to attack its validity. "

Cases referred to: *Bandahamy* v. *Senanayake*, 62 N.L.R. 313
W. Barnes de Silva v. *Galkissa Wattarappola Co-operative Stores Society*, 54 N.L.R. 326 ; XLVIII C.L.W. 102.
Jayasinghe v. *Boragodawatte Co-operative Stores*, 56 N.L.R. 462

H. W. Jayawardene, Q.C., with *G. T. Samarawickrama*, for the respondent-appellant

R. S. Wanasundera, Crown Counsel, for the applicant-respondent.

ABEYESUNDERE, J.

The Assistant Commissioner of Agrarian Services of the Kandy District, hereafter in this judgment referred to as the applicant-respondent, presented to the Magistrate's Court of Kandy a report under section 21 (1) of the Paddy Lands Act, No. 1 of 1958, hereafter in this judgment referred to as the Act, stating—

(*a*) that after an inquiry held under section 3 (2) of the Act, it was decided that the person who was the tenant and cultivator of the paddy land called Elamullapathakotasa was evicted after April 12, 1956, otherwise than for a prescribed cause ;

(*b*) that the said decision was communicated in writing to the landlord of the paddy land and the landlord did not appeal therefrom to the Board of Review ;

(*c*) that order was made under section 3 (3) (*b*) of the Act that Pitawela Gedera Loku Banda and all other persons in occupation of the paddy land shall vacate it on or before November 5, 1961 ; and

(*d*) that Pitawela Gedera Loku Banda had failed to vacate the paddy land as required by the said order.

He prayed for an order of the Court to evict Pitawela Gedera Loku Banda from the paddy land and mentioned H. A. William Singho as the person to whom delivery of possession of the paddy land should be made.

Summons was issued to Pitawela Gedera Loku Banda to show cause why he should not be evicted from the paddy land. He appeared in Court and stated that he had cause to show. The matter was fixed for inquiry. After inquiry the Magistrate made order on January 18, 1963, stating that he was " satisfied that the complainant has taken all the requisite steps under the Act " and " is, therefore, entitled to an eviction order against the respondent as the respondent has failed to show that he is entitled to occupy the extent of paddy land mentioned in the written report filed in Court " and requiring " that the respondent and all other persons in occupation of the field in question be evicted from such extent ". Pitawela Gedera Loku Banda, hereafter in this judgment referred to as the respondent-appellant, has appealed to this Court from the order of the Magistrate.

The order under section 3 (3) (*b*) of the Act requiring the respondent-appellant to vacate the paddy land was made on October 13, 1961, by the then Assistant Commissioner of Agrarian Services of the Kandy District, hereafter in this judgment referred to as the Assistant Commissioner. The counsel for the respondent-appellant submitted that the Magistrate should have satisfied himself, before he ordered the eviction of the respondent-appellant from the paddy land, that the aforesaid order of the Assistant Commissioner was valid. He also argued that the burden was on the applicant-respondent to prove the validity of the Assistant Commissioner's order. The Crown Counsel who appeared for the applicant-respondent submitted that the burden was on the respondent-appellant to show that he was entitled to occupy the paddy land and contended that there was no burden on the applicant-respondent to prove the validity of the Assistant Commissioner's order. The decision of this Court in the case of *Bandahamy* v. *Senanayake* (62 New Law Reports, page 313) was cited in support of the submission made on behalf of the respondent-appellant. That case was decided by seven judges of this Court. The majority of them held that where the powers of a Court were invoked for the enforcement of an award of an arbitrator as a decree of such Court in terms of rule 38 (13) of the rules made under section 46 of the Co-operative Societies Ordinance, the party against whom the award was sought to be enforced should be noticed and given an opportunity of showing the existence of defects, even though the award did not bear any fatal flaws on its face. The view of the majority of the aforesaid judges is consistent with the following view expressed by Gratiaen, J., in the case of *W. Barnes de Silva* v. *Galkissa Wattarappola Co-operative Stores Society* (54 New Law Reports, page 326) :—

> " . . . it is the clear duty of a Court of law whose machinery as a Court of execution is invoked to satisfy itself, before allowing writ to issue, that the purported decision or award is *prima facie* a valid decision or award made by a person duly authorised under the Ordinance to determine a dispute which has properly arisen for the decision of an extra-judicial tribunal under the Ordinance. In that event alone would the Court be justified in holding that the decision or award is entitled to recognition and capable, under the appropriate rule, of enforcement as if it were a decree of Court."

The judgment delivered by Sansoni, J., on January 20, 1959, on the appeal from the order of the Magistrate in M.C., Matugama, Case No. 26654 (S.C., Case No. 84 A-B of 1958) was cited in support of the submission made on behalf of the applicant-respondent. In that case the Government Agent of Kalutara, acting under section 120 of the Land Development Ordinance, through the Divisional Revenue Officer, filed a report in the Magistrate's Court stating that the permit granted under that Ordinance to the appellant for a certain allotment of land was duly cancelled and that the appellant was in unlawful occupation of the allotment of land and had failed to vacate it though served with a notice to do so. In dismissing the appeal the judge held that the appellant could not be heard to say that there should have been proof that he was served with a notice to vacate the land, that the burden throughout was on the person summoned to appear before the Magistrate that it was the duty of such person to show cause why he should not be ejected, and that the Magistrate was bound to make an order of ejectment if he was not satisfied that the person showing cause was entitled to the possession or occupation of the land.

The view of Gratiaen, J., quoted above is unexceptionable. It was adopted with approval by a Bench of three judges of this Court in the case of *Jayasinghe* v. *Boragodawatte Co-operative Stores* (56 New Law Reports, page 462). Sansoni, J., agreed with the decision in that case in his judgment in the aforesaid case of *Bandahamy* v. *Senanayake*. The principle that may be deduced from the decisions in the aforesaid three reported cases is that where an order that is not made by a Court is

sought to be enforced by a Court under any written law, the Court must be satisfied that such order is valid and the party affected by such order is entitled to attack its validity. I shall apply that principle in determining the appeal before me.

As the powers of the Magistrate's Court were invoked by the applicant-respondent to secure the execution of the Assistant Commissioner's order under section 3 (3) (*b*) of the Act, it was the duty of the Magistrate to have satisfied himself, before ordering the eviction of the respondent-appellant from the paddy land, that the order of the Assistant Commissioner had been legally made. The Magistrate has stated in his order that he was "satisfied that the complainant has taken all the requisite steps under the Act". The officer who presented to the Court the report under section 21 (1) of the Act and who is referred to by the Magistrate in his order as the "complainant" is not the Assistant Commissioner who made the order under section 3 (3) (*b*) of the Act. The Magistrate should have satisfied himself that the Assistant Commissioner who made the order under section 3 (3) (*b*) of the Act had jurisdiction to make such order. In sub-sections (2) and (3) of section 3 of the Act there are specified the facts which enable the assumption of jurisdiction to make an order under section 3 (3) (*b*) of the Act. Such order, if made in the absence of any of those facts, would be invalid.

The burden was on the respondent-appellant to show cause why he should not be evicted from the paddy land. He would have shown good cause if he established that the evidence placed before the Court by the applicant-respondent did not show that the Assistant Commissioner had legally made the order which the respondent-appellant was alleged to have disobeyed and upon the basis of which his eviction from the paddy land by order of the Court was sought by the applicant-respondent. The respondent-appellant showed by means of cross-examination of the witnesses of the applicant-respondent that there was no proof of some of the facts which were necessary for the assumption of jurisdiction by the Assistant Commissioner to make the order under section 3 (3) (*b*) of the Act.

Mr. A. E. A. Heppenstall was the Assistant Commissioner who held the inquiry under section 3 (2) of the Act. He stated in his evidence before the Magistrate that the paddy land belonged to the Dalada Maligawa, that after an inquiry he decided that William Singho was the tenant-cultivator of the paddy land and was evicted therefrom after April 12, 1956, that he could not definitely say whether the Diyawadana Nilame, who was the landlord of the paddy land, was given notice of the inquiry, and that on August 15, 1960, the Diyawadana Nilame was informed of the Assistant Commissioner's decision. The applicant-respondent, Mr. P. L. N. de Silva, who also gave evidence before the Magistrate, stated that the landlord had to be given notice of the inquiry under section 3 (2) of the Act, that there was a particular form of such notice, that the form was Form No. 15, and that such notice was sent in Form No. 15 to the Diyawadana Nilame. The fact that such notice was given to the Diyawadana Nilame should have been proved by summoning him to produce the notice alleged to have been sent to him and, if after having been summoned to do so, he failed to produce such notice before the Magistrate, secondary evidence of such notice should have been given by the applicant-respondent by producing a copy of such notice. The applicant-respondent failed to lead such evidence as aforesaid in regard to his averment that notice of the inquiry was given to the Diyawadana Nilame. I hold that there was no proof that notice of the inquiry was given to the Diyawadana Nilame and that consequently there was no proof that the landlord was given an opportunity of being heard in person or through a representative at the inquiry held under section 3 (2) of the Act.

The letter marked P 1 from the Diyawadana Nilame was relied on by the applicant-respondent to prove that the decision of the Assistant Commissioner after the inquiry was communicated to the Diyawadana Nilame by letter dated August 15, 1960. In the letter marked P 1 the Diyawadana Nilame refers to four letters of the Assistant Commissioner bearing the aforesaid date and different reference numbers, but the subject-matter of those four letters is not disclosed. It is not possible to draw from the letter marked P 1 the inference suggested by the applicant-respondent that such letter indicates that the aforesaid decision of the Assistant Commissioner was communicated to the Diyawadana Nilame. I hold that there was no proof of the communication of such decision to the Diyawadana Nilame.

Mr. Heppenstall's evidence in regard to the eviction of William Singho from the paddy land was that the eviction was after April 12, 1956. There was no evidence that William Singho's eviction was before the Act came into operation

in the Administrative District in which the paddy land wholly or mainly lies. Section 3 (2) of the Act applies only where the citizen of Ceylon alleged to have been a tenant and a cultivator of a paddy land was evicted therefrom after April 12 1956, and before the coming into operation of the Act in the Administrative District in which the paddy land wholly or mainly lies.

The applicant-respondent has failed to prove some of the facts necessary for enabling the Assistant Commissioner to assume jurisdiction to make the order under section 3 (3) (*b*) of the Act. Such failure constitutes a failure to prove that the Assistant Commissioner had such jurisdiction. I, therefore, hold that from the evidence placed before the Magistrate by the applicant-respondent it cannot be held that the applicant-respondent satisfied the Court that the Assistant Commissioner's order under section 3 (3) (*b*) of the Act was legally made.

I set aside the order made by the Magistrate on January 18, 1963.

Set aside.

Present : **Sansoni, J., and H. N. G. Fernando, J.**

A. L. M. SANOON *vs.* K. V. K. THEYVANDERARAJAH

S.C. No. 433/60(*F*)—*D.C. Colombo, No.* 766/*Z.*

Argued on : 4th November, 1963.
Decided on : 14th November, 1963.

Landlord and tenant—Lease—Tenant adjudged a lunatic—Arrears of rent—Payment of arrears after notice to quit—Action for ejectment—Have our Courts jurisdiction to grant equitable relief against forfeiture ?

Held : That it is well-settled law as declared by a long line of decisions of the Supreme Court, that the English principle of giving relief against a forfeiture on the ground of non-payment of rent is part of the law of Ceylon.

Cases referred to : *Sandford* v. *Peter*, (1893) 2 S.C.R. 35.
Silva v. *Dassanayake*, (1898) 3 N.L.R. 248.
Perera v. *Thaliff*, (1904) 8 N.L.R. 118.
Perera v. *Perera*, (1907) 10 N.L.R. 230.
Agar v. *Ranewake*, (1912) 16 N.L.R. 129.
Uduma Lebbe v. *Marakar*, (1905) 3 Bal: Reps: 215
Attorney-General v. *Ediriwickramasuriya*, (1940) 41 N.L.R. 499

H. V. Perera, Q.C., with *C. G. Weeramantry*, *H. D. Tambiah* and *N. S. A. Goonetilleke*, for the plaintiff-appellant.

C. Ranganathan, with *S. Sharvananda* and *Suriya Wickremasinghe*, for the defendant-respondent.

H. N. G. FERNANDO, J.

The defendant in this action has since 1948 been in occupation as sub-tenant and thereafter as tenant of certain business premises in Colombo. The property was formerly owned in half shares by two persons, Junaid and Mrs. Kuthdoos. In July, 1956, Junaid transferred his half-share to the plaintiff and requested the defendant by letter to pay the rent to the plaintiff. On September 26th, 1957, Mrs. Kuthdoos sold her half-share to the plaintiff, and wrote the letter P 6 (*a*) of the same date to the defendant. In this letter she stated that the defendant was in arrears of rent for the months of July, August and September, 1957, and requested the defendant to settle the arrears with the plaintiff and to pay the future rents to him. This letter was transmitted with a covering letter from the defendant's Proctor also dated 26th September, 1957, requesting payment to the plaintiff of the unpaid and future rents. The proctor added that the defendant was in arrears of rent to the plaintiff since July, 1956, referring presumably to the half-share of rent which had become payable to the plaintiff by reason of the earlier transfer of July, 1956. This letter was followed immediately by the Proctor's letter of 27th September, 1957, giving the defendant notice to quit and surrender the premises on the 31st October, 1957.

On the 1st of November, 1957, the defendant's proctor wrote to the plaintiff's proctor on behalf of the defendant's wife, stating that the plaintiff was well aware that defendant had been a lunatic for some time and stating also that he had been adjudged of unsound mind on the 23rd September, 1957. Subsequently on 8th November defendant's proctor sent a cheque for Rs. 450/- which was accepted without prejudice.

The learned District Judge held on the evidence that the defendant had been in arrears of rent from January to September, 1957, in respect of one half-share and from July to September, 1957, in respect of the other half-share. He held also that the payment of Rs. 450/- made in November, 1957, was more than sufficient to cover the amount in arrears. He dismissed the plaintiff's action on the ground that the Court has jurisdiction to grant equitable relief against forfeiture if, in fact, a tenant does pay up the rent in arrears. The only question for consideration in the appeal is whether this jurisdiction exists ; if it does there is no doubt that on the proved facts the defendant is entitled to that relief. The earliest reported case is referred to in *Rajaratnam's Digest* and in a judgment of this Court in 2 *Supreme Court Reports*, at page 35 : (*Sandford* v. *Peter*). Withers, J., states in the judgment that in the 1875 case reported in *Bevan and Siebel's Reports*, Cayley, C.J., and Dias, J., affirmed a judgment which " granted relief to a lessee against forfeiture for non-payment of rent ". *Rajaratnam's* note is to the effect that the tenant was in equity entitled to possess the land on paying the arrears of rent.

In *Sandford* v. *Peter*, Lawrie, A.C.J., acted upon the principle of English law that " In equity the construction put on a clause of forfeiture of a lease on non-payment of rent is that it is a mere security for the payment of rent, and that as the breach of that covenant is capable of a just compensation, a Court of equity may award the compensation and abstain from enforcing the forfeiture ".

The above-mentioned decision was much criticised in *Silva* v. *Dassanayake*, (1898) 3 N.L.R. 248, by Bonser, C.J., and Withers, J., sitting on the same Bench had to confess that he could find no authority in the Roman-Dutch Law for granting such relief to a tenant.

Nevertheless in 1904 (*Perera* v. *Thaliff*, 8 N.L.R. 118) this Court granted relief in a case where the tenant had failed to perform his covenant to pay the Municipal rates on the leased property.

In 1905, (3 Balasingham Reports 215), Layard, C.J., and Moncrieff, J., again granted relief stating that " Courts of Law and Courts of Equity are always now very loth to decree forfeiture for a term in a lease, and when a party pays the amount due, even where the proper time for payment has expired, it is usual to accept such payment and allow the term of the lease to continue ". In 1907 (*Perera* v. *Perera*, 10 N.L.R. 230), Wood Renton, J., also referred at some length to the jurisdiction of the Courts in England to grant equitable relief against forfeiture. He thought also that the same power could be exercised under the Roman-Dutch Law, but reference to the passage in *Voet* (19. 2. 18) upon which the learned Judge appeared to rely does not support the view that relief would be granted against forfeiture for non-payment of rent.

In *Agar* v. *Ranewaka*, (1912) 16 N.L.R. 129, Lascelles, C.J., with Wood Renton, J., agreeing, stated that " it is beyond question that the English principle of giving relief against a forfeiture on the ground of non-payment of rent have been introduced into Ceylon and are now a part of our law ". Lastly, there is the high authority of the opinion of Wijeywardena, J., (1940) 41 N.L.R. 499), that in an action for cancellation of a lease a defendant is, no doubt, entitled to ask equitable relief.

Counsel for the respondent in the present appeal has argued that the observation of Wijeywardena, J., was made *obiter*. It appears from the judgment, however, that the arrears had been paid up by the defendant after the due date and even after the institution of the action for cancellation of the lease. It may be that upon the facts of the particular case the Court would not in any event have granted relief, but it is clear that Wijeywardena, J., himself would have considered a grant of relief and only declined to do so because the tenant in that case had failed to ask for the relief and the Court was accordingly not obliged to give it. There was, therefore, in the judgment clear acceptance of the principle that under our law as declared in previous judgments of the Supreme Court the jurisdiction to grant relief against forfeiture for non-payment of rent does exist.

Having regard to this long line of decisions to which I have referred, I must take it as well-settled law that the principle which obtained under the English Law is followed in Ceylon, and I do not think it necessary to accede to Counsel's request that the question be considered by a fuller Bench.

The appeal is dismissed with costs.

SANSONI, J.

I agree.

Appeal dismissed.

Present: **Herat, J.**

GUNASEKERA *vs.* RAJAGURU, S.I. POLICE*

S.C. 839/1961—*M.C. Colombo*, 46299/*A*.

Argued and decided on: 21*st March*, 1962.

Evidence—Police Officer conducting raid without search warrant or even making preliminary entry in notebook—Admissibility of such Police officer's evidence—Magistrate rejecting defence witness' evidence—What matters should he consider before doing so.

Held: (1) That when a Police Officer has conducted a raid without either having a search warrant or even making a preliminary entry in his notebook the evidence of such Officer, though admissible, should be considered with circumspection.

(2) That before a Magistrate rejects the evidence of a witness there must be material elicited by cross examination or otherwise, together with questions of the witness' demeanour.

Cases referred to : *Browne* v *Dunn*, *Cockle's Cases on the Law of Evidence*, (6th Ed.)p. 299
King v *Hart*, 23 Cr. App. Reps. 202

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

F. C. Perera, Crown Counsel, for the Attorney-General.

HERAT, J.

In this case, the accused was charged with receiving or negotiating an unlawful bet. In this particular instance, the Police Officer who raided the accused-appellant's premises had no warrant nor did he produce any entries from his notebook wherein he had entered prior to his raid the circumstances under which he was effecting that raid. The Police Officer raided the premises without any of these preliminaries. His evidence was that the accused-appellant and a man called Muttiah were seated side by side at a table and that in the drawer of the table was found a betting slip with the names of three horses and the marked note paid in by the decoy. The evidence also discloses the presence of various papers relating to English races and race-horses. The decoy gave evidence and the raiding inspector also gave evidence. Muttiah referred to above was taken to the Police Station and his statement was recorded and, in fact, he appears on the record as one of the prosecution witnesses. At the trial however, Muttiah was not called by the prosecution but was called by the accused-appellant. Muttiah's account was that there was no decoy who had come in and paid money earlier and the denial of the decoy's story. Muttiah has not been cross-examined in any way.

Now, it has been laid down by this Court that when a raiding Police Officer gives evidence of his raid without either having had a search warrant or without even making a preliminary entry in his notebook relating to the raid, the evidence of such a Police Officer, whilst being undoubtedly admissible, should be considered, to say the least, with circumspection. I have, therefore, to view the evidence of this raiding officer in that light.

The learned Magistrate did not accept the evidence of Muttiah but the question is what material he had to reject Muttiah's evidence. It is strange that Muttiah was not cross-examined

* For Sinhala translation, see Sinhala section, Vol. 7 part 3, p. 9

at all and his story tested when the Police, according to the evidence disclosed, had already a recorded statement made by him shortly after the incident. Not even a single question to show that Muttiah was related to or friendly with the accused-appellant or was a partisan witness was put to him.

Learned counsel for the accused-appellant has brought to my notice certain passages in Cockle's Leading Cases referring to the House of Lords Case of *Browne* v. *Dunn* and of the Court of Criminal Appeal in *King* v. *Hart*. *Browne* v. *Dunn* is referred to in Cockle's Leading Cases, at page 257 and *King* v. *Hart* is reported in 23 Criminal Appeal Reports, at page 202. These cases indicate that before a Judge can say that he disbelieves or rejects the evidence of a witness, there should be some material elicited by some degree of cross-examination. The quantum of cross-examination varies with the circumstances of each case from which the credibility of the witness could be tested. It will not do without such material for a learned Judge to merely say that he does not believe a witness. There must be material elicited by cross-examination or otherwise appearing in the case together with questions of demeanour before a witness' evidence could be rejected. In this particular case, the testing of Muttiah's evidence was not according to these standards. In all the circumstances of the case, I do not feel that the charge brought against the accused-appellant satisfies me as being proved.

I, therefore, set aside the conviction and acquit the accused-appellant.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Present : **Basnayake, C.J. (President), Herat, J., and Abeyesundere, J.**

THE QUEEN *vs.* VELLAYAN, Son of Sadayan, & ANOTHER

Appeals Nos. 37-38 *of* 1963 *with Applications Nos.* 38-39 *of* 1963—*S.C. No.* 10/*M.C. Hatton, No.* 7116.

Argued on : July 8, 9 and 10, 1963.
Decided on : July 10, 1963.

Court of Criminal Appeal—Misdirection—Corroboration of witness by his own former statements—Evidence Ordinance, section 157*—Effect of section.*

The two accused were indicted on a charge of voluntarily causing grievous hurt to one Sinniah by means of a knife and found guilty and convicted. The case against the accused rested entirely on the evidence of the injured man, Sinniah.

The learned Judge directed the jury that Sinniah was an unsatisfactory witness and that if his evidence stood by itself they should not act on it. He directed them, however, that they could regard the evidence given by witnesses, A, B and C as corroborating Sinniah's evidence. A, B and C merely said that Sinniah told them that the accused had cut him with a knife.

Held : That this was a misdirection on a question of law. The evidence given by A, B and C merely corroborated Sinniah's testimony in Court. Section 157 of the Evidence Ordinance makes relevant a previous statement of a witness which is consistent with the testimony which he gives in Court. That section is no authority for the proposition that a consistent witness is necessarily a true witness and should be believed. The learned Judge was, therefore, wrong in directing that although Sinniah by himself was a witness unworthy of credit, his evidence could be acted upon because he had told A, B and C that the accused cut him with a knife.

The learned Judge further directed the Jury that Sinniah's evidence was corroborated by the discovery of a blood-stained sarong in the room which the first accused shared with other persons, and by the discovery of another blood-stained sarong in the room of the second accused.

Held : That as there was no evidence that the sarong in the room which the first accused shared with others was his sarong and that as there was no evidence that the sarong in the room of the second accused was his property or that the blood stains on that sarong were that of Sinniah, there was a misdirection on a question of fact, and that the misdirections were such as to render the verdict a wrong one.

Colvin R. de Silva, with *P. O. Wimalanaga* and *L. V. P. Wettasingha* (*assigned*), for the accused-appellants.

S. S. Wijesinha, Crown Counsel, for the Attorney-General.

BASNAYAKE, C.J.

The appellants, Vellayan, son of Sadayan and Ratnasamy, son of Rengasamy, were indicted on a charge of voluntarily causing grievous hurt to Sinniah son of Andiyappan, by means of an instrument for cutting, to wit, a knife on 24th March, 1962, at Maskeliya Estate, and they were found guilty by a divided verdict of 6 to 1 and each of them was sentenced to a term of three years rigorous imprisonment and to pay a fine of Rs. 500/- in default to undergo a further term of two years rigorous imprisonment. Out of the fine Rs. 500/- was to be paid to the injured man as compensation.

The case against the appellants rested entirely on the evidence of the injured man, Sinniah. His story is that the two appellants seized him at the muster ground, blind-folded him and carried him to somewhere near the boundary between Maskeliya and Glentilt Estates and caused the injuries that were found on him. The two injuries were incised wounds. The doctor who examined him describes them as follows :—

(1) incised wound, 4 inches in length on the antero-lateral surface of right forearm at the upper and just below the elbow, placed at right angles to the long axis of the arm and cutting through the muscles, vessels and bone.

(2) incised wound one-inch in length on back of head and scalp deep about two-and-a-half inches behind the middle of the outer border of the left ear.

There was a cut on the bone ; but the doctor was unable to say whether it was deep or superficial. Sinniah was cross-examined at great length and his credibility was attacked. The defence alleged that he had implicated the two appellants falsely. The evidence of Sinniah did not impress the learned Judge and in the course of his summing-up, he stated :—

"In this case the prosecution is relying only on the evidence of one eye-witness ; that is, the injured man himself, but the fact that there is only one witness available to bring a charge against the accused would not be a reason for you to say, 'Well, the prosecution has failed to discharge its burden' because if that one witness is believed by you in such a way that you can say, 'We are certain that he is speaking the truth when he says that these two accused carried him from the muster ground towards Glentilt Estate boundary and cut him there' then, of course, the case is proved, the charge against the accused would be proved having regard also to the medical evidence as to the nature of the injury which the injured man received."

Then having examined the evidence, the learned Judge stated as follows :—

"Even there, gentlemen, I think, probably you will take the view that Sinniah's evidence is not by any means satisfactory. I am drawing your attention to these features in Sinniah's evidence because, I think, speaking for myself, that if there was no other evidence in this case, and if you had to consider the credibility of Sinniah on Sinniah's evidence alone, it would be very difficult to decide to act on that evidence, and the question in this case is whether, although Sinniah's evidence is unsatisfactory in several parts, still there is sufficient corroborative evidence on a consideration of which you can come to the conclusion that Sinniah is speaking the truth when he says that he was cut by these two accused and by no others."

The learned Judge then proceeded to examine corroborative evidence he referred to, and stated thus :—

"There is the evidence of Karupiah, there is the evidence of Periyannan, there is the evidence of Ariyadasa Baas and there is the evidence of finding of clothes of these two accused on some of which blood stains have been identified by the Analyst, in fact, in all of them except one article of clothing, that is the shirt P 6 which the 1st accused was wearing at the time he was taken into custody."

Thereafter the learned Judge proceeded to examine the evidence of each of the witnesses, Karuppiah, Periyannan and Ariyadasa Baas and stated thus -:

"As I told you, gentlemen, if Sinniah's evidence stood by itself, you may not find much difficulty in deciding not to act on his evidence, seeing that he cannot be by any means described as a satisfactory witness, taking into account his evidence in this Court in regard to the motive, his evidence that he was struck with a club, his failing to tell the police that he was struck with a club, his having given one motive in his statement to the police and denying in this Court that there was such a motive."

Now the question is whether the jury acted on Sinniah's evidence which was characterised as unsatisfactory evidence of an interested witness who should not be believed because of the direction that Periyannan, Karupiah and Ariyadasa Baas gave corroborative evidence. Now Periyannan, Karupiah and Ariyadasa Baas make no independent contributon to the prosecution case. They merely repeat what Sinniah told them in regard to who his assailants were. Karupiah is the injured man's son-in-law and it was alleged by the defence that the father-in-law and the son-in-law had concocted a false story implicating the two accused. Karupiah was first on the scene and when Ariyadasa Baas and Periyannan got there Karupiah was already there. Karupiah's evidence is that when he was taking his morning tea, hearing the cries of children—

"One man is bleeding. There had been a fight; come, come."

he came out and saw the injured man, Sinniah, who said, "Call Cathavarayan and Nallasamy", that he then fetched these two men and asked him what was the matter, and that he answered, "Vellayan and Ratnasamy assaulted me and cut me. I have been injured, I cannot walk". In cross-examination he said that when he got back with the two men, Cathavarayan and Nallasamy, he saw Ariyadasa Baas standing near Sinniah. In regard to this witness the learned Judge directed the jury—

"So that when you consider the matter I think a doubt arises in your minds as to whether Karuppiah is a credible witness and speaking for myself I would advise you not to go on Karuppiah's evidence."

Ariyadasa Baas's evidence is that hearing cries similar to those heard by Karuppiah he went out and saw the injured man and went near him, that Karuppiah was already there, that he asked him what had happened, and that in answer to him, he said, Vellayan and Ratnasamy carried him, assaulted him and cut him. Periyannan's evidence is that on hearing from Nallasamy that Sinniah was injured he went to where he was and was told by him that Ratnasamy and Vellayan had assaulted him.

In order to corroborate the testimony of a witness, section 157 of the Evidence Ordinance, permits the proof of a former statement made by such witness whether written or verbal relating to the same fact at or about the time when the fact took place. That section enables the party that calls a witness to show that the witness has at or about the time when the fact took place stated what he has testified in Court in regard to the same fact. But that section is no authority for the proposition that a consistent witness is necessarily a true witness and should be believed. A witness who, as is alleged in this case, wants to implicate others falsely can be consistent in his falsehood. Consistency can be regarded as a factor that would commend the evidence of a witness whose evidence is free from taint. But in the case of a witness whose evidence is unworthy of credit and on whose testimony the jury have been advised not to act, proof of former statements consistent with his evidence cannot convert him from a witness unworthy of credit to one worthy of credit. Consistency is of little avail in the case of a witness whose testimony is unworthy of credit. The repetition by others of what a witness unworthy of credit has said cannot restore his credit even if the others are reliable witnesses and faithfully repeat what they heard. These statements do not stand on a better footing than the testimony of the unreliable witness.

The learned Judge was therefore wrong in directing that, although Sinniah by himself was a witness unworthy of credit, his evidence should be accepted as true, because in his statements to Periyannan and Ariyadasa Baas he mentioned the names of the accused. The learned Judge also referred to two circumstances which fixed the guilt of the accused and which converted the unacceptable evidence of Sinniah to evidence on which the jury may act. One was the finding of a sarong in the line-room which the 1st accused shared with his two brothers and some other persons. Now there is no proof that the sarong, P 5, which had blood-stains is the sarong of the 1st accused. The jury were invited, however, to infer that from the circumstance that the sarong was found in the room occupied by the 1st accused it was his sarong and that the blood-stains were the blood-stains which came on the sarong at or about the time when Sinniah was attacked. Such an inference cannot properly be drawn on the material placed before the jury. The direction that they may so infer is wrong. There was also the evidence of the sarong, P 10, which was found in the line-room of the 2nd accused, but there is no evidence that that sarong was his property or that the blood-stains that were on it were the blood-stains of the injured man and that those stains came on that sarong on the day of the attack. In the absence of evidence which renders these bits of circumstantial evidence inconsistent with their innocence, learned counsel for the appellants submitted that the jury should have been directed by the learned Judge that circumstances which were consistent with the accused's innocence should not be regarded as incriminating.

We are unable to hold that but for these misdirections the jury would have believed Sinniah. We, therefore, uphold the submissions of learned counsel for the appellants that the misdirections are such as to render the verdict a wrong verdict. We accordingly quash the conviction and direct that a judgment of acquittal be entered.

Appeal allowed.

Present : **The Lord Chancellor, Viscount Radcliffe, Lord Morton of Henryton, Lord Morris of Borth-Y-Gest and Lord Guest.**

M. B. IBRALEBBE *alias* RASA WATTAN & ANOTHER *vs.* THE QUEEN

From
THE SUPREME COURT OF CEYLON

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL UPON PETITION FOR SPECIAL LEAVE TO APPEAL

DELIVERED THE 6TH NOVEMBER, 1963.

Privy Council—Its jurisdiction to entertain and hear appeals in criminal matters from Ceylon—The right of Ceylon citizens to appeal to Her Majesty in Council—Her Majesty's prerogative rights—Have Her Majesty's prerogative rights in respect of judicial matters ceased on attainment of independence by Ceylon—Nature of the functions of the Judicial Committee—Its legal status—Right of Her Majesty to make Orders-in-Council in respect of Ceylon—Constitutional position of Ceylon after independence.

At the hearing of an application by two persons for special leave to appeal to Her Majesty in Council from a judgment of the Supreme Court of Ceylon (upholding their convictions in a District Court upon charges of causing hurt to certain persons), on the ground that the appeals involved an important issue relating to alleged misjoinder of charges, the attention of Their Lordships of the Privy Council was drawn to a decision of the Court of Criminal Appeal in Ceylon, which appeared to challenge the existence of any jurisdiction in Her Majesty in Council to entertain appeals in criminal matters arising in Ceylon. The decision in question is the case of *The Queen* v. *Aluthge Don Hemapala*, reported in 65 N.L.R. 313 and 65 C.L.W. 2. The main basis of that decision is that "on the attainment of independence, the prerogative right of the Sovereign of England to entertain appeals ceased when Ceylon ceased to be a Colony ".

On Their Lordships being informed by counsel for the respondent—The Attorney-General of Ceylon,—that it was highly desirable in the circumstances that an authoritative decision should be obtained, Their Lordships proceeded to consider the grounds of the said decision of the Court of Criminal Appeal in the light of the provisions of the legislative enactments of Ceylon, the Ceylon (Constitution) Order-in-Council, 1946, The Ceylon Independence Act of 1947 (11 and 12, Geo. VI, C.7, the Privy Council Appeals Act of 1833 (3 and 4, Wm. IV), the nature of the appeal to Her Majesty in Council in judicial matters, the legal status of the Judicial Committee and other relevant authorities.

Held : That the effect of Ceylon's attainment of independence and of the accompanying legislative provisions, so far as concerns the present right of Her Majesty to make Orders in Council affecting Ceylon is :

(*a*) that there is no power in Her Majesty to legislate for Ceylon or to participate in the Government of Ceylon, through the medium of Orders in Council ;

(*b*) that the structure of Courts for dealing with legal matters and the system of appeals existing at the date of independence have not been affected by any of the instruments that conferred that status ;

(*c*) that inasmuch as an Order in Council made upon report of the Judicial Committee is the effective judgment to dispose of and implement the Committee's decision of an appeal, the power to make such an order remains unabated ;

(*d*) that it must be recognised that the legislative competence of the Parliament of Ceylon includes power at any time, if it thinks right, to modify or terminate the Privy Council Appeal from its Courts ;

(*e*) that true independence is not in any way compromised by the continuance of that appeal, unless and until the Sovereign legislative body decides to end it.

Per THE JUDICIAL COMMITTEE.—(*a*) " But each such appeal civil or criminal is, if admissible at all, admissible as an appeal to Her Majesty's prerogative right to act as a final resort in the administration of justice, and there is not for this purpose any significant distinction between those that are entertained only by special leave and those which are regulated and admitted in accordance with a fixed set of rules, whether emanating originally from Order in Council, charter or letters patent or legislation local to the territory itself,"

(*b*) "The requirement of the Order-in-Council which is made upon an appeal that all persons concerned in the territory shall take notice of it and govern themselves accordingly is complemented in Ceylon by the provisions of those legislative enactments which direct the Courts there to give effect to judgments of the Privy Council on appeal and recognise in unambiguous language the 'undoubted right and authority of Her Majesty to admit or receive any appeal from any judgment decree sentence or order of the Court of Criminal Appeal or the Supreme Court'. The words last quoted appear in section 23 of the Court of Criminal Appeal Ordinance (Revised Legislative Enactments of Ceylon 1956 Ch. 7). Similar words occur in section 333 of the Criminal Procedure Code (1956 Ch. 20). The Courts Ordinance (1956 Ch. 6), on the other hand, which deals with criminal as well as civil jurisdiction contains, in section 39, the direction that in all cases of appeal to the Privy Council allowed by the Supreme Court or by Her Majesty in Council the transcript of the record is to be forwarded to the Privy Council, and in section 40, the duty is imposed on all Courts, supreme or original, to 'conform to execute and carry into immediate effect' judgments of the Privy Council on appeal. The same duty is imposed in the same words where criminal matters are concerned by section 334 of the Criminal Procedure Code."

(*c*) "It is true no doubt that the Privy Council appeal existed by prerogative right except so far as it was actually created or regulated by statute, but it is a mistake, when speaking of the prerogative in the judicial sphere, to speak of it as if its exercise were not as much Her Majesty's duty as Her right. Justice is 'owed'; it is not granted by favour or accorded at discretion. When it is propounded that the prerogative right of Her Majesty to entertain appeals or alternatively criminal appeals from Ceylon was terminated by independence, it needs to be remembered that what must also have been determined was the pre-existing right of every inhabitant of Ceylon to invoke that appeal, if he could show that it was warranted by his situation."

(*d*) "Their Lordships can discover nothing that bears on this in the terms of the Ceylon Independence Act. Its main purpose was to ensure that the new Parliament to be set up in Ceylon was not to be in any sense a subordinate legislature. It was to have the full legislative powers of a Sovereign independent State. Thus Acts of the United Kingdom Parliament were not to extend to Ceylon in the future, unless enacted with her consent and at her request; the Colonial Laws Validity Act 1865 was not to apply to any law made by the Parliament of Ceylon; that Parliament was to have full power to make laws with extra-territorial effect; and finally, no law made by the Parliament of Ceylon was to be void or inoperative on the ground of repugnancy to the law of England or to any existing or future Act of the United Kingdom or to any order rule or regulation made under any such Act and the powers of the Ceylon Parliament were to include power to repeal or amend any such Act, order, rule, or regulation, so far as the same was part of the law of Ceylon (*see* 1st Schedule 1 (2)."

Cases referred to: *The Queen* v. *Aluthge Don Hemapala*, LXV C.L.W. 2; 65 N.L.R. 313
A.G., Ontario v. *A.G., Canada* (1947) A.C. 127; (1947) 1 A.E.R. 137
A.G. v. *Perera*, (1953) A.C. 200; 54 N.L.R. 265; XLVIII C.L.W. 42; (1953) 2 W.L.R. 238
Pitts v. *La Fontaine*, (1880) 6 A.C. 482; 43 L.T. 519; 50 L.J.P.C. 8
Alex. Hull & Co. v. *M'Kenna*, (1926) Ir. Rep. 402.
British Coal Corporation v. *The King*, (1935) A.C. 500.
Nadan v. *The King*, (1926) A.C. 482; 134 L.T. 706; 42 T.L.R. 356; 95 L.J.P.C 113.

E. F. N. Gratiaen, Q.C., with *A. C. M. Ameer* and *T. O. Kellock*, for the petitioners.

Neil Lawson, Q.C., with *V. Tennakoon* and *V. S. A. Pullenayagum*, for the Attorney-General.

Dingle Foot, Q.C., with *R. K. Handoo*, as amici curiae.

VISCOUNT RADCLIFFE

On 31st October, 1963, Their Lordships had before them a Petition lodged by the above-named petitioners praying special leave to appeal to Her Majesty in Council from a judgment of the Supreme Court of Ceylon upholding their convictions in a District Court upon charges of causing hurt to certain persons. It was represented to Their Lordships that the appeals involved an important issue in the administration of the criminal law of Ceylon relating to alleged misjoinder of charges and that there had recently arisen considerable confusion as to the law upon this issue owing to what were said to be conflicting decisions upon the point emanating from the Supreme Court in the exercise of its criminal jurisdiction, on the one hand, and the Court of Criminal Appeal, on the other, and also from different judges of the Supreme Court itself.

Whether or not in these circumstances Their Lordships would have thought it right, without more, to advise the exercise of the special and exceptional jurisdiction of allowing an appeal in criminal matters, weight was added to the case for the petition by the fact that counsel on behalf of the respondent, appearing for the Attorney-General of Ceylon, stated to Their Lordships that his instructions were that the Attorney-General

himself thought it highly desirable, owing to the extreme confusion of the present situation, that an authoritative decision of the Board should be obtained. He did not, therefore, oppose the granting of the special leave to appeal that was asked for.

It was at this point that Their Lordships' attention was drawn to a recent decision of the Court of Criminal Appeal in Ceylon which appears to challenge the existence of any jurisdiction in Her Majesty in Council to entertain appeals in criminal matters arising in Ceylon. The judgment in question, with the contents of which Their Lordships are familiar, is that of the Chief Justice, Basnayake, C.J., delivered on the 14th October, 1963, in the case of *The Queen* v. *Aluthge Don Hemapala*, an appeal remitted to the Court of Criminal Appeal for final disposal in accordance with an Opinion of the Judicial Committee delivered by Sir Kenneth Gresson on the 27th May, 1963, and implemented by an Order in Council dated 30th May, 1963.

Having regard to the views expressed in the judgment of the learned Chief Justice, which have, naturally, been studied with much concern by Their Lordships, it seemed right that, before any decision was taken as to recommending special leave to appeal on the present Petition, a full argument should take place before the Board, in order that it should be in a position to form its considered view on the question of jurisdiction that had thus been mooted. Arrangements were made accordingly. Since not only the Petitioners but also the Attorney-General of Ceylon on behalf of the respondent stated that they wished to argue in opposition to the Chief Justice's view and in support of the continuing existence of the appeal in criminal matters, counsel were instructed by the latter to appear before the Board as *amici curiae* and to present argument in elaboration of the legal porpositions expressed by the Chief Justice. The argument on this point was heard before an enlarged Board (Lord Dilhorne, L.C., Viscount Radcliffe, Lord Morton of Henryton, Lord Morris of Borth-y-Guest and Lord Guest) on the 4th and 6th November last, and at the conclusion of the hearing Their Lordships announced that they were satisfied that the jurisdiction to entertain appeals from Ceylon before the Judicial Committee in criminal matters still existed and had not been abrogated by Ceylon's attainment of independence in 1947.

The proposition which is the foundation of the Chief Justice's judgment is that the right of the Sovereign to entertain appeals from territories outside the United Kingdom is a "prerogative right" enforceable by Order-in-Council made in the United Kingdom and that the continuance of such a right is necessarily inconsistent with the status of Ceylon as an independent political body. The essential part of his reasoning seems to be expressed in the following passage from his judgment :—"It is unthinkable that the Queen of England would do any act that would in the slightest degree impair the independence of Ceylon. When the Queen of England gave up Her right to legislate for Ceylon by Order-in-Council, it must be presumed that She gave up Her prerogative without reservation, and that She gave up Her prerogative right to promulgate any Order-in-Council having the force of law in Ceylon, for it is an established rule of construction of legal instruments that the greater includes the less. Apart from that, the right to make an Order-in-Council embodying the advice of the Privy Council being one that exists only in respect of colonies, that right cannot be exercised in respect of a country which is no longer a colony and is no longer subject to the suzerainty of the Sovereign of England. The resulting position then is that on the attainment of independence the prerogative right of the Sovereign of England to entertain appeals ceased when Ceylon ceased to be a colony".

Their Lordships feel no doubt that the Chief Justice's conclusion is founded upon a misunderstanding of the nature of an appeal to the Judicial Committee and of the Order in Council which forms the instrument by which the decision of the appeal is subsequently implemented. Such Orders are essentially judicial acts and it leads only to confusion to treat them as if they lay in the field of legislation, or, for that matter, of the administration of government in any ordinary sense. Nor is there any inherent connection between the judicial appeal to Her Majesty in Council which historically, existed in respect of decisions of Courts of judicature "in the East Indies, and in the plantations, colonies and other domin ons of Her Majesty abroad" (not excluding, for instance, the Channel Islands, part of the ancient Duchy of Normandy), and the status of any particular territory as a "colony" in the general sense in which that word is understood today. Their Lordships will enlarge upon the reasons which have led them to regard the Chief Justice's views as misconceived, but before doing so they must make one or two preliminary observations which

are called for by the somewhat unexpected manner in which this issue has been brought to notice.

In the first place, Their Lordships have not found it possible to reconcile the learned Chief Justice's apparent rejection of the validity of any post-1947 Order in Council affecting criminal proceedings in Ceylon with his actual treatment of the particular Order in Council to which his observations were directed. What had happened in that case was that, the appellant before the Board having been convicted of murder at a trial in the Supreme Court at Kalutara and his appeal having been dismissed by the Court of Crimnal Appeal, his appeal succeeded before the Board on the ground that the conviction was vitiated by fundamental irregularities of procedure, and an Order in Council was made on the report of the Board reversing the order of the Court of Criminal Appeal which had dismissed the appeal and remitting to that Court the decision of the question whether to quash the conviction and merely release the prisoner or to order a new trial in exercise of the statutory powers vested in the Court for this purpose. There is nothing unusual in a remit of that kind to the Court from which the appeal is brought. It restores the matter under appeal to the Court appealed from for final disposal, in the light of the Judicial Committee's rulings, and gives that Court the opportunity of further consideration of the proper order to make in any case where its existing powers allow it the choice between alternative courses of action.

The Chief Justice's judgment on the remit appears, however, to have proceeded on the basis that, while the Order in Council reversing the Court of Criminal Appeal's dismissal of the convicted man's appeal was legally effective, with the consequence that the Court should quash his conviction and direct his immediate release, that part of the Order which left it to the Court to decide whether or not to order a new trial was invalid, on the ground that " the prerogative right of the Sovereign of England in Council to entertain appeals from Ceylon (in criminal matters) ceased on Ceylon becoming an independent country ". The only explanation of this distinction, for which Their Lordships have not been able to find any rational basis, is contained in the words " the reversal of the decision of the Court of Criminal Appeal and the quashing of the appellant's conviction are unaffected by our present decision, as our present decision cannot affect past acts which have taken effect ".

It would not serve any useful purpose to advert further upon what presents itself to Their Lordships as an inconsistency of reasoning. For, if the true analysis of the state of affairs is that since the independence of Ceylon in 1947 the Sovereign in Council in England has had no power to make Orders-in-Council in judicial appeals relating to criminal matters in Ceylon, the Order in Ceylon reversing the Court of Criminal Appeal's dismissal of Hemapala's appeal must by the same reasoning have been a nullity as made without jurisdiction and can no more stand as a valid direction to that Court than that part of it which leaves it to the Court to consider whether to quash the conviction or to order a new trial.

Secondly, Their Lordships must admit their inability to detect in what respect the reasoning of the Chief Justice, if valid with regard to criminal appeals, would not also apply to appeals to the Judicial Committee in civil matters arising in Ceylon. There is no doubt that the learned Chief Justice regarded his opinion as limited to appeals in criminal matters. He says so explicitly in one of the concluding passages of his judgment. But how does his reasoning apply with less force to civil than to criminal appeals ? The latter, if allowed at all, are allowed by a grant of special leave ; civil appeals, on the other hand, are regulated in general by the rules as to value and subject-matter which are at present contained in the schedule to Chapter 100 of the 1956 edition of the Revised Legislative Enactments of Ceylon, the Appeals (Privy Council) Ordinance, first enacted in its current form on 6th May, 1910. These rules (*see* rule 32) are expressed as being subject to the right of Her Majesty in Council to admit any appeal on such conditions as may appear to Her to be appropriate, and would be understood, failing any new interpretation required by the judgment of the Chief Justice, as recognising and sanctioning Her right to grant special leave to appeal in any proper civil case whether or not within the limits allowed " as of right ". But each such appeal, civil or criminal, is, if admissible at all, admissible as an appeal to Her Majesty's prerogative right to act as a final resort in the administration of justice, and there is not for this purpose any significant distinction between those that are entertained only by special leave and those which are regulated and admitted in accordance with a fixed set of rules, whether emanating originally from Order in Council, charter or letters patent or legislation local to the territory itself. This point has already been alluded to and explained by Their Lordishps' Board in *A.G.*,

Ontario v. *A.G., Canada*, (1947) A.C. 127, where it is said by Earl Jowitt, L.C., at p. 145, with regard to appeals by special leave and appeals "as of right"—"fundamentally in both classes of case the appeal is founded on that prerogative which, as long ago as 1867 in *Reg* v. *Bertrand*, was described as the 'inherent prerogative and right and, on all proper occasions, the duty of the Queen in Council to exercise an appellate jurisdiction' ". The method of giving effect to the judgment on all such appeals is the same for all—an Order in Council made upon the report of the Judicial Committee ; and, if it were correct to suppose that, after independence, the power to make Orders in Council on judicial appeals is abrogated by the bare fact of independence itself, it seems that it would be impossible to detect any valid reason why the necessary Order in Council should be less obnoxious in civil than in criminal appeals.

Yet, civil and criminal appeals from Ceylon have been entertained without interruption since 1947. Civil appeals have been admitted and leave granted under the local rules ; appeals of both kinds have been heard before the Board, which until his recent death regularly included the late Mr. de Silva, a former member of the judiciary of Ceylon appointed to the Judicial Committee for the purpose of helping with those appeals ; and the advice tendered by the Board to the Sovereign has been implemented by Orders in Council embodying the usual requirement that the Governor-General or Officer administering the Government of Ceylon for the time being and all other persons whom it might concern should take notice of the Order and govern themselves accordingly. Indeed, as recently as the year 1953 the Crown in Ceylon appeared before the Board as a successful appellant from an order of the Court of Criminal Appeal (*see A.G.* v. *Perera*, (1953) A.C. 200),* and although on that occasion the respondent submitted an argument to the effect that the Judicial Committee had no jurisdiction to entertain an appeal from a judgment that had quashed the conviction of an accused person, it did not apparently occur to anyone then, any more than on other occasions, that the criminal appeal itself had disappeared with the coming of independence to Ceylon.

The requirement of the Order in Council which is made upon an appeal that all persons concerned in the territory shall take notice of it and govern themselves accordingly is complemented in Ceylon by the provisions of those legislative enactments which direct the Courts there to give effect to judgments of the Privy Council on appeal and recognise in unambiguous language the 'undoubted right and authority of Her Majesty to admit or receive any appeal from any judgment, decree, sentence or order of the Court of Criminal Appeal or the Supreme Court". The words last quoted appear in section 23 of the Court of Criminal Appeal Ordinance (Revised Legislative Enactments of Ceylon, 1956, Ch. 7). Similar words occur in section 333 of the Criminal Procedure Code (1956, Ch. 20). The Courts Ordinance, (1956, Ch. 6), on the other hand, which deals with criminal as well as civil jurisdiction, contains in section 39 the direction that in all cases of appeal to the Privy Council allowed by the Supreme Court or by Her Majesty in Council the transcript of the record is to be forwarded to the Privy Council, and in section 40 the duty is imposed on all Courts, supreme or original, to "conform to, execute and carry into immediate effect" judgments of the Privy Council on appeal. The same duty is imposed in the same words, where criminal matters are concerned, by section 334 of the Criminal Procedure Code.

It would not be possible to ignore the significance of these statutory provisions, which form part of the law of Ceylon, on the ground that they are mere relics of pre-independence days, which have been left stranded by time on the shores of the statute book. Such an explanation is irreconcilable with the fact that they all appear revised edition of 1956. That revision was brought into existence under the special Act, (1956, Ch. 1, enacted on 1st February, 1956), which appointed (section 2), the Hon. H. H. Basnayake, Chief Justice, Commissioner to prepare a new and revised edition of the legislative enactments of Ceylon in force on 31st December, 1954, of such later date as might be proclaimed by the Governor-General. The effective date, in fact, became 30th June, 1956, when by virtue of section 12 (2) the revised laws came into force as the existing *corpus* of legislation of Ceylon. Among the powers conferred upon the Commissioner by the Act was the power to omit from the revised edition any legislative enactment which had been repealed expressly or by necessary implication (*see* section 3 (1) (*a*).)

Their Lordships, therefore, cannot follow the Chief Justice in his passing reference to these statutory provisions at the close of his judgment—"the recognition", he says, "when Ceylon was a British colony, in the statutes of Ceylon, of the prerogative right of His Majesty in Council to

* 54 N.L.R. 265 ; 48 C.L.W. 42.

entertain appeals from the Ceylon Courts does not have the effect of creating a right of appeal by implication and continuing it, even after Ceylon has ceased to be a colony and the judicial prerogative of the Sovereign has ceased in respect of this country. When the very foundation of the prerogative to entertain such appeals is gone those provisions have no application to what does not exist". But, with great respect to the view so formulated, the relevant question is not whether the continuance of these enactments in the revised statute book could in itself create by implication the prerogative right to entertain appeals. There is no need to debate whether it could. The essential point to attend to, in their Lordships' opinion, is to inquire whether there is anything in the legislative or other measures which brought about the independence of Ceylon or the constitutional status resulting from those measures which by necessary implication put an end to the prerogative right to hear appeals and the complementary right to apply for them, which undoubtedly existed up to the date of that event. And in answering that question it seems highly unreal to ignore the significance of the continued presence of provisions in the revised statute book which recognise the right of appeal, since in common with the other circumstances to which their Lordships have thought it proper to allude their presence testifies plainly to the fact that, if the coming of independence did by itself impliedly abolish the judicial appeal, the implication, though now said to be necessary, has escaped for years the notice of all those most directly concerned with the administration of the appeal system.

Their Lordships must now turn to consider the nature of the appeal to Her Majesty in Council in judicial matters which, for brevity, they will refer to as the Privy Council appeal. In their opinion it has long been recognised that the Order-in Council which implements the decision of such appeals is in everything but form the equivalent of a legal judgment. As such it has no analogy with an Order in Council having legislative effect or with an Order in Council that is part of the administration of Government, except in the widest general sense that each within its category derives its ultimate force from some form of sovereign authority and thus can be said to "make law". It is necessary to say this, because it is in their view a basic fallacy to suppose that the irrevocable cession of legislative authority to the Parliament of Ceylon or the vesting of the executive power of the Island in a Governor-General acting on the advice of a Cabinet of Ministers responsible to that Parliament has by any necessary implication terminated the judicial power of Her Majesty under the system of appeals as it existed at the date of independence.

It is true, no doubt, that the Privy Council appeal existed by prerogative right, except so far as it was actually created or regulated by statute, but it is a mistake, when speaking of the prerogative in the judicial sphere, to speak of it as if its exercise were not as much Her Majesty's duty as Her right. Justice is "owed"; it is not granted by favour or accorded at discretion. When it is propounded that the prerogative right of Her Majesty to entertain appeals, or alternatively criminal appeals, from Ceylon was terminated by independence, it needs to be remembered that what must also have been determined was the pre-existing right of every inhabitant of Ceylon to invoke that appeal, if he could show that it was warranted by his situation.

The institution of the Judicial Committee by the Privy Council Appeals Act of 1833 (3 and 4, Wm. IV) had a functional effect upon the judicial powers of the Privy Council itself. It did not take long for commentators to observe that what had happened was that the judicial powers had been transferred from the Council to what was to be in substance an independent Court of law and that the connection between the two bodies was in future no more than nominal. Thus Professor Dicey in his book "The Privy Council" (published in 1887, but, in fact, a re-issue of his Arnold Prize Essay of 1860) is found observing on page 144 "Even those vestiges of the Council's ancient jurisdiction have been taken away by the Act 3 and 4, Wm. IV, for this measure transfers the judicial powers of the Council from the whole body, who, however, did not exert them, to a special Committee. Thus statute has produced the same effect on the Council's legal authority which custom has had in its political powers. In each the functions of the whole body have passed into the hands of a smaller committee, connected with the Privy Council by little more than its name".

The Judicial Committee itself has been insistent on many occasions to record and explain its independent legal status. Thus as early as 1880 Sir James Colville in *Pitts* v. *La Fontaine*, 6 A.C. 482, defined the position as follows: "when a decision of this Board has been reported to Her Majesty and has been sanctioned and embodied in an Order in Council it becomes the decree or

order of the final Court of Appeal . . . and . . . it is the duty of every subordinate tribunal to whom that order is addressed to carry it into execution ".

The two fullest statements as to the relationship between the Judicial Committee and the Privy Council and as to the Order in Council which implements the Committee's reports are that of Lord Haldane in *Alex. Hull & Co.* v. *M'Kenna*, (1926) Ir. Rep. 402, and that of Lord Sankey in *British Coal Corporation* v. *The King*, (1935) A.C. 500. In the former Lord Haldane spoke of the " long standing constitutional anomaly that we are really a Committee of the Privy Council giving advice to His Majesty, but in a judicial spirit ". " We are really judges ", he went on to say, " but in form and name we are the Committee of the Privy Council. The Sovereign gives the judgment himself and always acts upon the report that we make. Our report is made public before it is sent up to the Sovereign in Council. It is delivered here in printed form. It is a report as to what is proper to be done on the principles of justice, and it is acted upon by the Sovereign in full Privy Council, so that *per se*, in substance what takes place is a strictly judicial proceeding ".

Lord Sankey's account appears at pages 510/512 of the *British Coal Corporation* case. " It is clear ", he said with reference to the 1883 Act, " that the Committee is regarded in the Act as a judicial body or Court, though all it can do is to report or recommend to His Majesty in Council by whom alone the Order-in-Council which is made to give effect to the report of the Committee is made.

But according to constitutional convention it is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are in truth an appellate Court of law to whom by the statute of 1833 all appeals within their purview are referred " . . .

" In this way the functions of the Judicial Committee as a Court of law were established. The practice had grown up that the colonies under the authority either of Orders-in-Council or of Acts of Parliament should provide for appeals as of right from their Courts to the King in Council and should fix the conditions under which such appeals should be permitted. But outside these limits there had always been reserved a discretion to the King in Council to grant special leave to appeal from a colonial Court irrespective of the limitations fixed by the colonial law ; this discretion to grant special leave to appeal was in practice described as the prerogative right ; it was, in deed a residuum of the Royal prerogative of the Sovereign as the fountain of justice . . . Although in form the appeal was still (*i.e.*, after the Judicial Committee Acts) to the King in Council, it was so in form only and became in truth an appeal to the Judicial Commtitee, which as such exercised as a Court of law in reality, though not in name, the residual prerogative of the King in Council. No doubt, it was the order of the King in Council which gave effect to their reports but that order was in no sense other than in form either the King's personal order or the order of the general body of the Privy Council. "

Their Lordships take it to be clear, therefore, that the Order-in-Council which gives effect to a Judicial Committee report is a judicial order. It is an " order or decree . . . on appeal", to use the words of section 21 of the 1833 Act. It is mandatory in its directions to those whom it affects by virtue of the provisions of that section. The Judicial Committee Acts applied, when enacted, to all parts of the Sovereign's overseas territories covered by the enacting words and remain part of the law of such territories until validly repealed. That, indeed, was the reason why, before the Statute of Westminster, the Parliament of Canada could not of its own authority abolish criminal appeals from Canada, owing to the bar imposed by the Colonial Laws Validity Act (*see Nadan* v. *The King*, (1926) A.C. 482) ; and why, on the other hand, after the Statute of Westminster, the Parliament of Canada had power to do just that thing, first with regard to criminal appeals (*British Coal Corporation* v. *The King*, (1935) A.C. 500) and, later, with regard to appeals generally (*A.G., Ontario* v. *A.G., Canada*, (1947) A.C. 127), and, in the course of abolishing the latter, to enact that the " Judicial Committee Act, 1833, Ch. 41, of the statutes of the United Kingdom of Great Britain and Ireland, 1833, and the Judicial Committee Act, 1844, Ch. 69, of the statutes of the United Kingdom of Great Britain and Ireland, 1844, and all orders, rules or regulations made under the said Acts are hereby repealed in so far as the same are part of the law of Canada. "

The complement to the injunction contained in section 21 of the 1833 Act is, for Ceylon, the sections of its local legislation which have already been referred to, section 40 of the Courts Ordinance

and section 334 of the Criminal Procedure Code. Between them, these various legislative provisions establish that the Privy Council appeal is part of the judicial system of Ceylon, a part of the structure of original and appellate Courts by which legal decisions, judgments, decrees and orders are passed and recorded.

It is not as if the Judicial Committee was in essence an English institution or an institution of the United Kingdom. On the contrary, as Lord Haldane said in *Alex. Hull & Co.* v. *M'Kenna* (*supra*), it is " not a body, strictly-speaking, with any location ". " It is not ", he said, " an English body in any exclusive sense. It is no more an English body than it is an Indian body, or a Canadian body, or a South African body, or, for the future, an Irish Free State body ". If and when a territory having constitutional power to do so, as Ceylon now has, decides to abrogate the appeal to the Judicial Committee from its local Courts, what it does is to effect an amendment of its own judicial structure.

It remains now to inquire whether there was anything in the establishment of independence for Ceylon that, expressly or impliedly, brought about that amendment. The instruments employed were the Ceylon Independence Act, 1947, of the Parliament of the United Kingdom (11 and 12 Geo. VI, C. 7) and the several Orders-in-Council setting up the Ceylon Constitution, of which the Ceylon (Constitution) Order-in-Council, 1946 (hereinafter referred to as the 1946 Order) is the substantive enactment. It can be said at once that nowhere is there to be found in these instruments any reference to the Privy Council appeal, its continuance or its extinguishment. Independence as such did not, of course, alter the existing *corpus* of law in Ceylon. The only question, therefore, can be whether the appeal was affected by some necessary implication derived from the fact that its continuance would be in plain conflict with what was actually established.

Their Lordships can discover nothing that bears on this in the terms of the Ceylon Independence Act. Its main purpose was to ensure that the new Parliament to be set up in Ceylon was not to be in any sense a subordinate legislature. It was to have the full legislative powers of a Sovereign independent State. Thus Acts of the United Kingdom Parliament were not to extend to Ceylon in the future, unless enacted with her consent and at her request ; the Colonial Laws Validity Act, 1865, was not to apply to any law made by the Parliament of Ceylon ; that Parliament was to have full power to make laws with extra-territorial effect ; and, finally, no law made by the Parliament of Ceylon was to be void or inoperative on the ground of repugnancy to the law of England or to any existing or future Act of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Ceylon Parliament were to include power to repeal or amend any such Act, order, rule or regulation, so far as the same was part of the law of Ceylon (*see* 1st Schedule 1 (2)). This was a liberating Act in the sense that it freed the Parliament of Ceylon from every one of the constitutional limitations which, traditionally, inhibited the law-making powers of subordinate legislatures in the British dominions. But the present question is not about the law-making powers of the Parliament of Ceylon ; and there is nothing in the provisions quoted or in the only material provision of the Act not dealing with legislative powers, that declaring (section 1 (2)) that His Majesty's Government in the United Kingdom were, in future, to have no responsibility for the Government of Ceylon, with which the continuance of the Privy Council appeal would be inconsistent or conflicting.

The 1946 Order is divided into nine separate parts, of which much the most considerable is, naturally, that dealing with the Legislature, Part III. Part II provides for the appointment and functions of a Governor-General ; Part III, for the setting up of the Legislature ; Part IV, for electoral districts ; Part V, for the Executive ; Part VI, for the Judicature ; and Part VII for the Public Service.

Part III, which embraces sections 7 to 39, begins by enacting that there is to be a Parliament of the Island consisting of His Majesty and two Chambers. By section 29 there is conferred upon the Parliament power to make laws for the " peace, order and good government " of Ceylon, subject to certain protective reservations for the exercise of religion and the freedom of religious bodies. The words, " peace, order and good government " connote, in British constitutional language, the widest law-making powers appropriate to a Sovereign. Apart from the fundamental reservations specified in section 29, the Order contained only two qualifications on the full legislative authority of Parliament. One was set out in the following section, section 30, which reserved to His Majesty power by Order in Council to legislate on certain matters of defence, security and foreign

relations. The other was the provision made in section 39 that Laws relating to certain Ceylon Government stocks should be capable of disallowance by His Majesty through a Secretary of State.

The reservation embodied in section 30 was relinquished in the next year by the Ceylon (Independence) Order in Council, 1947 (*see* section 4). This came into force on the 4th February, 1948, and as from that date, apart from the minor qualification introduced by section 29, the Parliament of Ceylon enjoyed unrestricted legislative power.

To turn to Part V. It is entitled "The Executive" and contains two formative sections, of which the first, section 45, declares that the executive power of the Island is to continue vested in His Majesty, exercisable on his behalf by the Governor-General in accordance with the provisions of the Order and any other law for the time being in force, and the second, section 46, provides that the general direction and control of the government of the Island are to be in the charge of a Cabinet of Ministers appointed by the Governor-General and responsible to Parliament. The remaining sections of Part V are only supplementary.

Part VI is entitled "The Judicature". There is nothing in this Part that deals with the structure of Courts in the Island, with appeals or with the legal system generally. It is concerned only to regulate the appointment and tenure of office of Judges of the Supreme Court (section 52) and to set up a Judicial Service Commission (sections 53-56), in which is to be vested the appointment, transfer, dismissal and disciplinary control of judicial officers.

Their Lordships can now summarise what is, in their opinion, the effect of Ceylon's attainment of independence and of the accompanying legislative provisions, so far as concerns the present right of Her Majesty to make Orders -in-Council affecting Ceylon. There is no power to legislate for Ceylon ; to do so would be wholly inconsistent with the unqualified powers of legislation conceded by the 1946 Order. There is no power to participate in the government of Ceylon through the medium of Orders-in-Council, since the control and direction of the government of the territory are in the charge of the Cabinet of Ministers, responsible to the Parliament of Ceylon, and in the Governor-General according to his constitutional powers. But the structure of Courts for dealing with legal matters and the system of appeals existing at the date of independence have not been affected by any of the instruments that conferred that status, and it follows that, inasmuch as an Order-in-Council made upon report of the Judicial Committee is the effective judgment to dispose of and implement the Committee's decision of an appeal, the power to make such an Order remains unabated.

Their Lordships must observe in conclusion, having regard to one or two remarks that appear in the judgment of the learned Chief Justice, that it seems to them a misleading simplification to speak of the continuance of the Privy Council appeal as being inherently inconsistent with Ceylon's status as an independent territory or as being bound up with a relationship between Her Majesty and colonial subjects. Historically, the assumption would in itself be inaccurate, and, constitutionally, it is unnecessary. For, if it is recognised, as it must be, that the legislative competence of the Parliament of Ceylon includes power at any time, if it thinks right, to modify or terminate the Privy Council appeal from its Courts, true independence is not in any way compromised by the continuance of that appeal, unless and until the Sovereign legislative body decides to end it.

For these reasons their Lordships are of opinion that the Board has jurisdiction to entertain the appeal for which the petitioners seek special leave and in due course to recommend to Her Majesty the making of whatever Orders in Council may be required to admit it and dispose of it. Having regard to what has been said at the opening of this Opinion they have humbly advised Her Majesty to grant leave to appeal in this case.

Leave to appeal granted.

Present : **Sri Skanda Rajah, J.**

PONNUDURAI *vs.* S. I., POLICE, VELAVATHURAI

Application for Revision in M.C. Point Pedro, 12834.
(*Application* 341/63).

Argued and decided on : October 24, 1963.

Evidence—Certified copy—Statement of Tamil person recorded in Information Book in Sinhala—Statement certified by Tamil sergeant who could not read Sinhala—Validity —Accused charged with several offences—Conviction on some charges—Is it open to a Magistrate to warn and discharge the accused on the remaining charges—Criminal Procedure Code, section 325 (1).

Held : (1) That a copy of a statement alleged to have been certified by a person who is not competent to read the language in which it was recorded is not a certified copy.

(2) That it is not open to a Magistrate who convicts an accused person on some counts in the charge to deal with him under section 325 (1) of the Criminal Procedure Code in respect of the remaining charges against him.

G. F. Sethukavalar with *S. G. Wijesekera,* for the petitioner.

N. B. D. S. Wijesekera, Crown Counsel, for the Attorney-General.

SRI SKANDA RAJAH, J.

This application for revision is considered along with Appeals 567 and 568. The application for revision is by the 3rd accused, because he had no right of appeal, the sentence imposed on him being a non-appealable one. The appeals and the application have been pressed both on the facts and on the law. In view of the order I propose to make I do not wish to say anything on the facts.

It would appear that the statement on the injured man, who is a Tamil, had been recorded in the police information book in Sinhala, and it was certified by a Tamil sergeant who could not read Sinhala. Under those circumstances, by no stretch of imagination could such a copy be termed a certified copy. A copy of a statement alleged to have been certified by a person who is not competent to read the language in which it was recorded is not a certified copy. It is quite clear that the accused was prejudiced in that this copy could be understood neither by the accused or by his proctor, or even by the sergeant who purported to certify it being handed to the accused. Such a course amounts to a denial of justice.

It is a pity that in predominantly Tamil-speaking areas statements made in Tamil should be recorded in the police information book in Sinhala. One would expect a sufficient number of persons conversant with the language of the area to be stationed at such police stations so that the interests of justice would not suffer by statements being recorded in a language other than the one in which statements are made. I do hope that this matter will be brought to the notice of the powers that be, and that this unsatisfactory state will be soon remedied.

I would, therefore, allow the application for revision and also the appeals, and set aside the conviction and send the case back to the Magistrate's Court of Point Pedro for a fresh trial before another Magistrate.

I further find that though the Magistrate purported to convict one of the accused on two counts, he purported to discharge that accused on the 2nd count. Having convicted, *i.e.*, having found him guilty, it was not open to the Magistrate to deal with the accused under section 325 (1) of the Criminal Procedure Code. He should have passed sentence on that count also. He could not have discharged him with a warning on that count. I have repeatedly pointed this out and I do hope that Magistrates will be careful about making use of section 325 (1) of the Criminal Procedure Code.

Set aside.

Present : **Sri Skanda Rajah, J.**

Y. PIYASEELI & ANOTHER *vs.* W. PEIRIS

S.C. 649-650—*M.C. Kuliyapitiya,* 8915.

Argued and decided on : 14th October, 1963.

Criminal Procedure Code, section 148 1 (*b*)—*Private plaints—Summons issued—Accused charged from the summons—Later plaint amended—Is it open to a magistrate to charge from amended plaint?*

Held : That there is no provision corresponding to section 148 (1) (*b*) of the Criminal Procedure Code in respect of private plaints. Hence it is not permissible for a Magistrate to charge an accused from an amended private plaint even though the offence is punishable with imprisonment for not more than three months.

Per SRI SKANDA RAJAH.—" This is a private case and it is common knowledge that private cases are treated by Magistrates on a different footing from police cases, though there is no provision in the Criminal Procedure Code to make any such distinction. I wish again to stress that Magistrates should not make the distinction between private plaints and police plaints. The failure to dispose of private cases in quick time is a fruitful source of serious crime in this country. "

G. T. Samarawickrema, for the accused-appellants.

No appearances, for the complainant-respondent.

SRI SKANDA RAJAH, J.

This case reveals a very unhappy state of affairs in our Courts. The original plaint in this case was filed on the 27th December, 1960, and an amended plaint was filed on the 4th March, 1961, and the case was disposed of only on the 4th June, 1963, that is to say, two years and three months after the amended plaint. It is high time that Magistrates took control of proceedings in their Courts and disposed of cases within a short time.

It will be of interest to everybody concerned in the administration of justice if I point out that indictable cases in the United Kingdom are heard, and even the Court of Criminal Appeal decision is made within an outside limit of six months of the initiation of the proceedings.

This is a private case and it is common knowledge that private cases are treated by Magistrates on a different footing from police cases, though there is no provision in the Criminal Procedure Code to make any such distinction. I wish again to stress that Magistrates should not make any distinction between private plaints and police plaints. The failure to dispose of private cases in quick time is a fruitful source of serious crime in this country.

After the plaint was filed, summons was issued and the accused was charged on the summons. That was in accordance with the provisions of the law. But an amended plaint was filed and the second charge in it is one under section 410 of the Penal Code, the maximum punishment for that offence is imprisonment of either description for two years. Under the circumstances, the Magistrate should not have proceeded to charge the accused from the amended plaint.

Section 187 (3) refers to charging an accused from a written report under section 148 (1) (*b*) if the offence is one punishable with not more than three months imprisonment or a fine of Rs. 50/-. It shall be lawful for the Magistrate to read such report as a charge to the accused and ask him to show cause why he should not be convicted.

Section 148 (1) (*b*) refers to reports made to the Magistrate by an inquirer under Chapter 12 or by a peace officer, by a public servant, or Municipal servant or servant of the Urban Council or Town Council. By implication the Magistrate could not in such a case charge the accused from the report if the punishment exceeds three months' imprisonment. There is no corresponding provision in the Criminal Procedure Code in respect of private plaints. In the case of a private plaint, the Magistrate could not have charged from the amended plaint even if the offence is punishable with imprisonment for not more than three months. Therefore, I would set aside the conviction and sentence.

As an inordinate length of time has elapsed I would order the accused to be acquitted.

Accused acquitted.

Present : **H. N. G. Fernando, J.**

THE SUPERINTENDENT, OAKWELL ESTATE, HALDUMMULLA

vs.

THE LANKA ESTATE WORKERS' UNION

S.C. No. 13/62—*Labour Tribunal, No.* 1/8082.

THE SUPERINTENDENT, AMBANPITIYA ESTATE, AMBANPITIYA

vs.

THE LANKA ESTATE WORKERS' UNION

S.C. No. 35/62—*Labour Tribunal, No.* 4/2609.

THE MANAGER, HUNASGERIA GROUP, ELKADUWA

vs.

THE LANKA ESTATE WORKERS' UNION

S.C. No. 1/63—*Labour Tribunal, No.* 6/4876.

Argued on : 27th May, 1963.
Decided on : 30th September, 1963.

Estate Labour (Indian) Ordinance, (Cap. 133), *section* 23—*Does it apply to persons born in Ceylon and who are descendants of actual emigrants from India* ?—*Can Superintendent of an estate lawfully terminate the services of the spouse of an employee, whose employment has been terminated by the employer* ?

Held : That section 23 of the Estate Labour (Indian) Ordinance (Cap. 133) applies to persons born in Ceylon, who are commonly known as " Indian estate labourers ". Therefore, it is lawful for an employer to terminate the services of the spouse of an employee who quits his employment, even when the employee quits in consequence of the termination of the employment by the *employer.*

Cases referred to : *Superintendent, Walapane Estate* v. *Walapane, Sri Lanka Watu Kamkaru Sangamaya,* 65 N.L.R. 8 ; LXIV C.L.W. 30
Mudanayake v. *Sivagnanasunderam,* 53 N.L.R.25 ; XLV C.L.W. 49.

In S.C., No. 13/62 *and in S.C., No.* 1/63.

H. V. Perera, Q.C., with *L. Kadirgamar*, for the appellant.

Colvin R. de Silva with *R. Weerakoon*, for the respondent.

In S.C., No. 35/62.

H. V. Perera, Q.C., with *H. W. Jayewardene, Q.C.*, and *S. Sharvananda*, for the appellant.

Colvin R. de Silva with *M. T. M. Sivardeen* and *R. Weerakoon*, for the respondent.

H. N. G. Fernando, J.

The ground of appeal in each of these three cases is the same, namely, that according to the judgment of three Judges of this Court in the case of *Superintendent, Walapane Estate* v. *Walapane, Sri Lanka Watu Kamkaru Sangamaya,* 65 N.L.R. 8,§ t is lawful for an employer to terminate the services of the spouse of an employee who quits his employment, even when the employee quits in consequence of the termination of the employment *by the employer.* According to that decision, the orders for the reinstatement of the respondents in each of these cases are erroneous in law.

But there has been one question, not considered previously, which has been argued by counsel for the respondent partly in consequence of some

§ 64 C.L.W. 30 * For Sinhala translation, see Sinhala section, Vol. 7 part 3, p. 11

encouragement from me. The question is whether section 23 of the Estate Labour (Indian) Ordinance, (Cap. 133), can be held to apply to persons born in Ceylon who have not actually emigrated from India, but are only descendents of such actual emigrants.

The term " labourer " is defined as follows :—

" labourer " means any labourer and *kangany* (commonly known as Indian coolies) whose name is borne on an estate register, and includes the Muslims commonly known as ' *Tulicans.* '

This definition is not in keeping with current usage in that the word " cooly " is not, or, at least, is not supposed to be, now applied to any category of workers. But apart from that consideration, the definition did not at the time of its enactment, and does not at the present time, give much room for doubt as to the persons who fall within its scope. There is still a category of persons commonly known as " Indian estate labourers " just as much as there was formerly a category known as " Indian coolies ", the difference being purely one of name and not of substance. Indeed, in some contexts, such as that of the case of *Mudanayake* v. *Sivagnanasunderam*,* it has been contended on behalf of this category of persons that they are a " community " within the meaning of section 29 of the Constitution.

There is nothing in Chapter 133 itself to show that " Indian coolies " was a term employed with the intention of including only actual emigrants from India. What misled me at first was the definition in Chapter 132 of the term " Indian immigrant labourer " which clearly refers only to actual emigrants from India. But that *later* Ordinance deals with the emigration to Ceylon, and the first employment in Ceylon of persons coming from India, and the narrow definition was sufficient and necessary for its purposes. Section 2 of Chapter 132 provides that the Ordinance shall, so far as is consistent with the tenor thereof be read as one with Chapter 133. But there is no indication at all of any intention to modify any provision of the earlier Chapter 133.

I hold, therefore, that section 23 of Chapter 133 does apply to persons born in Ceylon who are commonly known as " Indian estate labourers ".

Following the decision in the *Walapane* case, I would set aside the orders made by the Labour Tribunals in each of these three cases. I make no order for costs.

Set aside.

Present : **Basnayake, C.J., H. N. G. Fernando, J., and Sinnetamby, J.**

P. R. PEIRIS *vs.* E. S. DASSENAIKE

Application for Conditional Leave to appeal to Privy Council in S.C. 57/D.C. Colombo, No. 12380/S. (Application No. 255).

Argued on : June 6, 1961.
Decided on : March 16, 1962.

Privy Council—Appeals (Privy Council) Ordinance, sections 2, 3—Appeal to Supreme Court from judgment of District Court—Non-compliance with Rule 29 (1) of the Civil Appellate Rules—Abatement of appeal by operation of law—Whether application for leave to appeal to Privy Council lies in these circumstances—Meaning of term " abatement ".

The petitioner sought to appeal to the Supreme Court from a judgment of the District Court but failed to comply with Rule 2 (1) of the Civil Appellate Rules. His appeal was thereafter rejected by the Supreme Court, having been deemed to have abated by the operation of Rule 4. He thereafter made the present application for leave to appeal to the Privy Council.

Held : (1) That no application lay in such a case inasmuch as the appeal to the Supreme Court must be deemed to have abated by operation of law and there was thus no appeal before it.

(2) That when the Supreme Court made a formal order rejecting the appeal it merely gave expression to the fact that there was no appeal pending before it and such a formal order was not a " judgment " or " order " within the meaning of section 2 of the Appeals (Privy Council) Ordinance.

* 53 N.L.R. 25 ; 45 C.L.W. 49.

Per SINNETAMBY, J.—" Irrespective, therefore, of whether a formal order is made or not, in law, the appeal has abated. In this particular case, no formal order appears to have been made by the District Judge ; but when the appeal came up before this Court, it was rejected. In *Fernando* v. *Samaranayake*, (62 N.L.R. 397), a similar situation arose and Weerasooriya, J., who delivered the judgment of the Court stated that there should be a formal order of abatement before an appeal can be regarded as having abated. With this view, I find myself unable to agree. Rule 4 itself states that on failure to comply with the requirements of Rule 2 the appeal is deemed to have abated and, in my view, no further steps can be thereafter taken. It is for that reason that the Supreme Court, in such a case, does not " dismiss " an appeal but only " rejects " it. The word " dismiss" is, I venture to think, used in the case of valid appeals which are pending and the word " reject " in cases where in strict law, there is no valid appeal before the Court ".

Cases referred to : *Palaniappa Chettiar et al.* v. *Mercantile Bank*, XXIII C.L.W. 93 ; 43 N.L.R. 127.
Fernando v. *Samaranayake*, 62 N.L.R. 397.

H. V. Perera, Q.C., with *S. Sharvananda*, for the petitioner-appellant.

E. B. Wikremanayake, Q.C., with *H. A. Koattegoda, G. T. Samarawickreme* and *R. Bandaranayake*, for the plaintiff-respondent.

BASNAYAKE, C.J.

The question that arises for decision on this application for leave to appeal to the Privy Council is whether such an application lies in the instant case.

The petitioner sought to appeal to this Court from the judgment of the District Court ; but he failed to comply with the requirements of Rule 2(1) of the Civil Appellate Rules, 1938, and on objection taken by counsel the appeal was rejected on 17th May, 1960, as it was deemed to have abated by operation of Rule 4 of those Rules. The Appeals (Privy Council) Ordinance provides for an appeal to the Privy Council against judgments and orders of the Supreme Court (section 3). The expression " judgment " is used in the Ordinance in the sense of " a decree, order, sentence, or decision " (section 2). An appeal lies—

" (*a*) as of right, from any final judgment of the Court, where the matter in dispute on the appeal amounts to or is of the value of five thousand rupees or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the value of five thousand rupees or upwards ; and

(*b*) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision." (Rule 1, Schedule).

In the instant case there was no appeal before this Court as it had abated by operation of law. The effect of abatement in legal procedure is thus stated in Sweet's Law Dictionary—

" In procedure, abatement is where an action is put an end to and destroyed by the death of one of the parties, or some other event which makes it impossible to continue the action."

Bouvier's Law Dictionary in setting out the distinction between abatement in Chancery Practice and in law states—

" It differs from abatement at law in this ; that in the latter, the action is entirely dead and cannot be revived ; but in the former the right to proceed is merely suspended, and may be revived by a supplemental bill in the nature of a bill or revivor."

What we have here is an abatement at law.

Although it is an appeal and not an action in the Court of first instance the consequence of abatement is the same whether it be an appeal or an action and the appeal, if ever it was in existence, came to an end on abatement. As this appeal was lodged long before the Supreme Court Appeals (Special Provision) Act, No. 4 of 1960, the record of the case should not have been forwarded by the District Court to this Court because the consequence of the abatement of the appeal by operation of Rule 4 (2) was that it ceased to be an appeal. When this Court made order rejecting the appeal it gave formal expression to the fact that there was no appeal before it and the order it made was not a judgment or order in the case. The petitioner cannot for that reason

be in a better position than he would have been if the District Judge did not forward the appeal on the ground that it had abated, or if the Registrar had not listed it as it was not an appeal that should properly be included in the list of appeals for hearing.

I am of opinion that the petitioner is not entitled to the leave he seeks. His application is accordingly refused with costs.

H. N. G. FERNANDO, J.
I agree.

SINNETAMBY, J.

I agree with My Lord, the Chief Justice, that this application should be refused. The petitioner-appellant had intervened in an action between the plaintiff-respondent and the defendant-respondent in the course of execution proceedings. The defendant-respondent had transferred a certain property to the petitioner-appellant which, at that time, was alleged to have been under seizure upon a writ issued by the plaintiff-respondent. The property was subsequently sold under the writ and purchased by the plaintiff-respondent. The petitioner-appellant moved to set aside the sale and the District Judge refused his application. Against that refusal he filed a petition of appeal but failed to comply with the requirements of Rule 2 (1) of the Civil Appellate Rules, 1938. Under Rule 4, the failure of the appellant to comply with the provisions of Rule 2 (1) abates the appeal. It has been held by this Court that the abatement in such a situation takes place by operation of law and that the formal order of abatement which the District Judge makes in pursuance thereof is merely a ministerial act, *Palaniappa Chettiar et al* v. *Mercantile Bank*, (43 N.L.R. 127). Irrespective, therefore, of whether a formal order is made or not, in law, the appeal has abated. In this particular case, no formal order appears to have been made by the District Judge ; but when the appeal came up before this Court, it was rejected. In *Fernando* v. *Samaranayake*, (62 N.L.R. 397), a similar situation arose and Weerasooriya, J., who delivered the judgment of the Court stated that there should be a formal order of abatement before an appeal can be regarded as having abated. With this view, I find myself unable to agree. Rule 4 itself states that on failure to comply with the requirements of Rule 2 the appeal is deemed to have abated and, in my view, no further steps can be thereafter taken. It is for that reason that the Supreme Court, in such a case, does not "dismiss" an appeal but only "rejects" it. The word "dismiss" is, I venture to think, used in the case of valid appeals which are pending and the word "reject" in cases where in strict law there is no valid appeal before the Court. In these circumstances, therefore, it seems to me that the rejection of an appeal is not a final order or a judgment affecting the appeal against which an application can be made for leave to appeal to the Privy Council. Once an appeal is deemed to have abated, I agree with My Lord the Chief Justice that the entire case comes to an end and no further steps can be taken until the action is revived by a successful application to have the abatement set aside.

Application refused.

Present : **H. N. G. Fernando, J. and T. S. Fernando, J.**

ROSALIN NONA *vs.* HERAT

S.C. No. 17/1959 (*A-B*)—*D.C.* (*Inty.*) *Kegalle*, *T.* 1807.

Argued on : 8th September, 1960.
Decided on : 27th October, 1960.

Administration of Estates—Application by administrator to sell land to recover testamentary expenses—Intervention by third parties claiming unencumbered title—Has the Court jurisdiction to determine disputes as to title in such proceedings.

Held : That where an administrator claims any property as being the property of the estate, or as being liable to be sold in order to repay the debts of the estate or the expenses of administration, the Court does not in the Testamentary proceedings have jurisdiction to determine disputes as to title in respect of such property between the administrator and third parties.

Per H.N.G. FERNANDO J.—"The usual restriction contained in a grant of letters, which prohibits the sale of immovable property by an administrator without the authority of the Court, is a measure designed for the protection of the estate and the heirs, and not for the protection of other interests. The grant of leave to sell is merely a release of the administrator from the restriction imposed in the letters, and is neither an adjudication upon the title, if any, of the intestate or the administrator, nor anything equivalent to an order for a sale in execution enforceable with the aid of the process of the Court."

C. R. Gunaratne, for the petitioner-appellant, in both appeals.

V. G. B. Perera with *Desmond Fernando*, for the administratrix-respondent, in both appeals.

H. N. G. FERNANDO, J.

In this case the administratrix of the estate of a deceased intestate applied to the District Court for authority to sell certain immovable property in order to recover Testamentary expenses incurred by her. The application related to (*a*) an undivided half-share of Getakosgahamullewatte in extent 1 rood 39.50 perches and (*b*) Lot 4 of a land called Durayagewatte Pillewa. The intestate had died in 1950, leaving two persons as heirs, his widow the Administratrix and a son, George Herat. In regard to the first land, George in 1952 sold his half-share to one Rosalin Nona, and the widow sold her half-share to another person. By Partition Decree in Action No. 8646 entered in April, 1955 (XI) the land was partitioned, and the Lot then allotted to Rosalin Nona is the land which the Administratrix now proposes to sell. In regard to the second land, George had sold his half-share to one D. C. Appuhamy, who in 1956 obtained a Partition Decree in Action No. 10029 to which the intestate's widow was a party. The Lot 4 now sought to be sold is identical with the Lot allotted to D. C. Appuhamy in that Action.

Rosalin Nona and D. C. Appuhamy intervened in the Testamentary case objecting to the sale, and they now appeal against the order of the learned District Judge dismissing their objections. The principal ground of the objections is that the Partition Decrees have given a conclusive title to the lots allotted thereby, and that the Lots are not subject to any change or lien in respect of the debts of the intestate or of his estate.

The usual restriction contained in a grant of letters, which prohibits the sale of immovable property by an administrator without the authority of the Court, is a measure designed for the protection of the estate and the heirs, and not for the protection of other interests. The grant of leave to sell is merely a release of the Administrator from the restriction imposed in the letters, and is neither an adjudication upon the title, if any, of the intestate or the Administrator, nor anything equivalent to an order for a sale in execution enforceable with the aid of the process of the court.

The common law does not prevent a person from executing a transfer of property which may, in fact, belong or turn out to belong to another, although, of course, the transferee in such a case acquires no title as against the true owner. A transferee from an Administrator cannot claim to be in any better position on the score that the transfer was executed with the leave of the Court. If, therefore, an administrator claims any property as being the property of the estate or as being liable to be sold in order to repay the debts of the estate or the expenses of administration, the court does not in the testamentary proceedings have jurisdiction to determine disputes as to title between the administrator and third parties. The appellants had no right to call upon the court to adjudicate upon their claims of unencumbered title to the two lands in question. The action, if any, which they should take at this stage to protect their interests is not a matter upon which they can be advised by this court.

I would dismiss the appeals, in each case with costs fixed at Rs. 31.50.

T. S. FERNANDO,

I agree.

Appeals dismissed.

Present : **Basnayake, C.J., Abeyesundere, J., and G. P. A. Silva, J.**

THE COLOMBO ELECTRIC TRAMWAYS & LIGHTING CO., LTD.

vs.

THE COMMISSIONER OF INLAND REVENUE

S.C. No. 11—*Income Tax Case No. BRA/E.* 30.
Argued on : January 25 and 29, 1963.
Decided on : January 29, 1963.

Excess Profits Duty Ordinance No. 38 *of* 1941, *section* 2—*Profits arising from any business—Section* 4—*Gratuities paid to employees by employer on cessation of business—Whether deductible in ascertaining profits or income—Whether payments of a capital nature under section* 10 (*c*) *of the Income Tax Ordinance,* (*Cap.* 188, *Legislative Enactments,* 1938)—*Whether paid on a cessation of business, or for the purpose of carrying on the business.*

The appellant was carrying on the businesses of the running of tramcars in Colombo, and that of contractors and suppliers of electric current for lighting. Between 1927 and 1928, the business of supplying electric current was taken over by the Government, and on the 31st August, 1944, the activity of running electric tramcars was acquired by the Municipal Council of Colombo. After the latter acquisition by the Municipal Council, the appellant paid those who were its employees in the activity of running electric tramcars a sum of Rs. 188,946/- as gratuity. The right to deduct this sum in ascertaining the profits from the business of the appellant for the purposes of the Excess Profits Duty Ordinance, No. 38 of 1941, was disputed on the following grounds :—

(*a*) That the sum of Rs. 188,946/- was paid by the appellant to the employees in the tramcar service because there was a cessation of business, and was not paid for the purpose of carrying on that business.

(*b*) That the sums of Rs. 107,986/-, Rs. 43,775/- and Rs. 3 ,185/- paid by the appellant were voluntary payments made to the employees, and that no liability to pay them was incurred by the assessee until the date of payment. As these three sums were paid after the assessee had ceased to carry on business of running tramcars they were outgoings of a capital nature.

Under section 4 of the Excess Profits Duty Ordinance, the profits arising from any business to which the Ordinance applied were to be determined in the manner and on the same principles as they would be determined for the purposes of income tax.

Held : (1) That the payments were deductible, and did not constitute expenditure of a capital nature under section 10 (*c*) of the Income Tax Ordinance, (Cap. 188, Legislative Enactments, 1938).

(2) That the fact that the appellant paid gratuities on retirement must undoubtedly have been a matter which the appellant's employees took into consideration in entering into the Company's service on the salaries they were offered. And that the fact that the gratuities were paid on the cessation of the activity made no difference.

H. W. Jayawardene, Q.C., with *M. Sivagurunathan,* for the assessee-appellant.

V. Tennekoon, Deputy Solicitor-General, with *M. Kanagasunderam* and *E. D. Wikramanayake, Crown Counsel,* for the assessor-respondent.

BASNAYAKE, C.J.

The assessee, the Colombo Electric Tramways and Lighting Company, was a non-resident company which commenced to carry on business in Ceylon in the year 1901. Until the year 1927 the assessee carried on in Ceylon the activity of running electric tramcars by virtue of a contract with the Municipal Council of Colombo, executed in 1896, which gave the assessee the exclusive right of running tramcars in Colombo subject to the right of the Municipal Council to purchase the business on giving a year's notice. The assessee also acted as electrical contractors and suppliers of electric current for lighting. Separate accounts were kept of each of those activities.

Between the years 1927 and 1928 the assessee's activity of generating and supplying of electric current for lighting was taken over by the Government, and the assessee ceased to engage in that activity thereafter. On 31st August, 1944, the activity of running electric tramcars was acquired by the Municipal Council of Colombo in the exercise of its rights under the contract referred to above. The persons employed by the assessee in

this activity were taken into the service of the Municipal Council. There remained only the activity of electrical contract work which the assessee carried on till 14th August, 1945, on which date the business was sold to the United Planters of Ceylon, Ltd., whereupon the assessee company went into voluntary liquidation.

After its acquisition by the Municipal Council the assessee paid those who were its employees in the activity of running electric tramcars a sum of Rs. 188,946/- as gratuity. The minutes of the Board which relate to the payment of gratuity are as follows —

" 1. Minutes of Board Meeting held on 28th September, 1943 :

Superannuation gratuity, etc.

Cable 22nd September from B. Bros.

Daily-paid employees 15 years and over gratuity payable

Strikers calculated three-quarters	Rs.	79,416
Additional one month's pay ..	„	7,365
Daily-paid employees' one week's pay per year for those under 15 years	„	22,447
Total ..	Rs.	109,228

The Board sanctioned a gratuity on the above basis to be paid when the personnel concerned cease to be employees of the Company.

" 2. Minutes of the Board of Meeting held on 16th January, 1945 :

Gratuity to clerks and Inspectors (after take-over of tramways by Municipality).

Rs. 40,000 was allocated by the Board for payment of a gratuity to the Clerks and Inspectors in recognition of their past services.

The Board resolved that the Company goes into liquidation and that the necessary steps be taken to accomplish this.

" 3. Minutes of the Board Meeting held on 3rd July, 1945 :

The Board authorised the following payments :—

To Mr. B. B. Anderson ..	Rs	25,000
„ Mr. D. J. O. Gray (one year's salary)	„	12,000

as gratuities on leaving the Company's service and taking employment with the Colombo Municipality."

From the inception of the assessee's business in Ceylon, in 1901, till the year 1931, the employees enjoyed the benefits of a provident fund to which both employer and employee contributed. In the latter year the provident fund scheme was wound-up by paying over to each employee the contributions made by him together with the contributions made by the employer, and a superannuation scheme was introduced. Under that scheme it would appear that an employee on leaving the assessee's service became entitled to a gratuity. The assessee's right to deduct payments made under the superannuation scheme in ascertaining the profits from the assessee's business does not appear to have been disputed ; but, the deduction, in ascertaining the profits from the business of the assessee, of the payment made to the assessee's employees on the acquisition of the activity of running tramcars is disputed on the following grounds :—

(*a*) that the sum of Rs. 188,946/- was paid by the assessee to the employees in the tramcar service because there was a cessation of business and was not paid for the purpose of carrying on that business ;

(*b*) that the sums of Rs. 107,986/-, Rs. 43,775/- and Rs. 37,185/- paid by the assessee were voluntary payments made to the employees and that no liability to pay them was incurred by the assessee until the date of payment. As these three sums of money were paid after the assessee had ceased to carry on the activity of running tramcars the payments were outgoings of a capital nature.

The Board sought to distinguish the payments made under the superannuation scheme to employees who left the service while the assessee was engaged in the activity of running tramcars from the payments made after it ceased to carry on that activity on the ground that in the former category were persons who retired from the service of the company and that in the latter category were persons whose services were terminated " under certain circumstances ". In their reasons the Board observe :

"The employees would not have received the sum of Rs. 188,946/- at the time they received it if the tramway business of the appellant company had not been taken over by the Municipal Council. This payment on account of gratuities had been definitely incurred as a result of cessation of the tramway business. These payments were voluntary payments."

It is conceded that the payments of Rs. 43,775/- and Rs. 37,185/- do not fall within the year of assessment to which this appeal relates. The learned Deputy Solicitor-General does not seek to maintain that the electric tramways is a separate business in view of the fact that all these years all the activities of the assessee including the tramways have been treated as one business.

The fact that the assessee paid a gratuity on retirement must undoubtedly have been a matter which the assessee's employees took into consideration in entering into the company's service on the salaries they were offered. It is the recognition of that fact that made the Income Tax authority to refrain from disallowing the deductions of gratuities paid in respect of those employees who retired from service while the assessee was engaged in the activity of running tramcars. The employees who were in service when the take-over occurred were also persons, like their predecessors who had retired, who, in accepting the salaries they were offered when they entered the service, took into account the fact that at the end of their period of service they would receive a gratuity. The fact that the gratuities now in question were paid on the cessation of the activity makes no difference. We have no doubt that the payments, not only do not fall within section 10 (*c*) as expenditure of a capital nature, but that they are also deductible in ascertaining the profits from the assessee's business. Our opinion is that the sum of Rs. 107,986/- is allowable as a deduction in arriving at the profits for the Excess Profits Duty assessment for the accounting period commencing on 1st January, 1944, and ending on 31st December of the same year.

We, therefore, remit the case to the Board in order that they may revise the assessment in accordance with our opinion.

The appellant is entitled to the costs of this appeal and the refund of the fee paid under section 74 (1) of the Income Tax Ordinance.

ABEYESUNDERE, J.
I agree.

G. P. A. SILVA, J.
I agree.

Appeal allowed and case sent back.

Present : **Basnayake, C.J., and de Silva, J.**

PERERA & OTHERS *vs.* ELISAHAMY*

S.C. No. 267/59—*D.C. Colombo, No.* 7538/*P.*

Argued and decided on : September 8, 1961.

Evidence Ordinance, sections 68, 69—*Partition Act, section* 69—*Partition action—Deed adduced in proof of title impeached as being a forgery—Attesting witnesses and notary dead—How should such deed be proved.*

Deed—Admission of, as evidence without proper proof—No objection taken though genuineness impeached—Can Court act on such evidence.

Held : (1) That as the genuiness of the deed in question had been impeached, it should have been formally proved in the manner prescribed by the Evidence Ordinance. As both attesting witnesses were dead, there should have been evidence that the attestation of at least one attesting witness was in his handwriting and that the signature of the person executing it was in such person's handwriting.

(2) That section 69 of the Partition Act does not apply to cases in which the genuineness of a deed is impeached or the Court requires its proof.

(3) That even though no objection was taken to the document when its contents were first spoken to by a witness, it should not have been used as evidence and acted upon by the Court. A Court cannot act on facts which are not proved in the manner prescribed in the Evidence Ordinance.

* For Sinhala translation, see Sinhala section, Vol. 7 part 4, p. 13

Followed : *Lim Yang Hong & Co.* v. *Lam Choong & Co.*, (1928) A.I.R. (P.C.) 127.

N. E. Weerasooriya, Q.C., with *W. D. Gunasekara*, for the 2nd and 10th to 12th defendants-appellants.

T. B. Dissanayake, for the plaintiff-respondent.

BASNAYAKE, C.J.

This is a partition action. The plaintiff is the widow of Gamage Peiris Perera. She bases her title on deed P 3. By that deed four of the seven children of Arnolis and his two brothers, Thidoris and Jamis, sold to her husband their interests in Ambagaha Kumbura and Delgaha Kumbura. Her claim is resisted by the 10th and the 12th defendants who are children of Arnolis. They dispute the genuineness of deed P 3 and allege that it is a forgery.

It is common ground that the attesting witnesses to this deed and the notary are dead. One of the matters in dispute formulated at the commencement of the trial was the genuineness of deed P 3. The learned District Judge, acting on the evidence of the witness, Marcus Perera, held that deed P 3 was genuine. This finding is challenged as the deed has not been proved in accordance with the provisions of the Evidence Ordinance. Marcus Perera's evidence is as follows :—

> " . . . I know the occasion when the deed was executed in favour of Peiris by Podinona and the others. That deed was signed in Podinona's house. Podinona was Arnolis' wife. W. Cornelis Silva was the notary who executed this deed. He is now dead. I live close by and I associate closely with these people. I was there at the time this deed was executed. Gabriel and Aron Perera signed as witnesses to the deed. They are also dead now. I attended their funerals. One of them died recently as the result of the explosion of a bomb. There were six or eight persons present but I cannot say exactly who signed the deed. Jamis was there and Thidoris, Nicholas, the 10th defendant, Belinis, the 11th defendant, a person called Kirakka and Podinona, the 10th defendant's mother were also there."

It is submitted by learned counsel for the appellants that this evidence does not satisfy the requirements of the Evidence Ordinance. The relevant sections are 68 and 69. They are as follows :—

> " 68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.
>
> " 69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom of Great Britain and Northern Ireland, it must be proved that the attestation of one attesting witness, at least, is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."

As both attesting witnesses are dead in the instant case, there should be evidence that the attestation of, at least, one attesting witness is in his handwriting and that the signature of the person executing the document is in her handwriting. Marcus Perera has not stated nor does his evidence prove that the attestation of one attesting witness to the deed P 3 is in his handwriting and that the signature of the person executing the document is in the handwriting of that person. As its genuineness was impeached by the appellant the document P 3 should not have been used as evidence in the case without formal proof. Section 69 of the Partition Act is of no avail in the instant case as that section does not apply to cases in which the genuineness of a deed is impeached or the Court requires its proof. Although no objection was taken to the document at the time when its contents were first spoken to by the witness, the fact that its genuineness was impeached rendered formal proof necessary regardless of whether objection was taken or not. A Court cannot act on facts which are not proved in the manner prescribed in the Evidence Ordinance, [(1928) A.I.R. (Privy Council) 127].

We accordingly set aside the interlocutory decree and direct that the case be sent back to the lower Court so that the rights of the parties may be decided without any reference to deed P 3 which has not been proved.

We also set aside that part of the judgment in which the learned Judge holds that Peiris Perera was entitled to the shares of the contestants by virtue of prescriptive possession.

The defendants are entitled to the costs of the appeal payable by the plaintiff.

DE SILVA, J.

I agree.

Appeal allowed.

Privy Council Appeal, No. 46 *of* 1962.

Present : **Lord Evershed, Lord Morris of Borth-Y-Gest, Lord Guest, Lord Devlin, Lord Pearce.**

THE FREE LANKA INSURANCE CO., LTD. *vs.* A. E. RANASINGHE

From
THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

DELIVERED THE 16TH DECEMBER, 1963.

Insurance—Insurance against third-party risks—Insurer's right to limit his liability in respect of injuries to third parties—Sections 128 *and* 133, *Motor Car Ordinance,* 45 *of* 1938—*Sections* 100 *and* 105, *Motor Traffic Act,* 14 *of* 1951—*Motor Car Ordinance, Sections* 127 *to* 149—*Motor Traffic Act, sections* 99 *to* 121.

Interpretation Ordinance, (*Cap.* 1), *section* 6 (3) (*b*)—*Repeal by written law of former written law—Effect of such repeal on a right acquired under former written law—Meaning of word "right" in that sub-section.*

On the 29th March, 1948, the respondent was injured in a motor collision with a lorry, whose owner had insured it with the appellant against injuries to third parties from accident. By the contract of insurance between the appellant and the owner, the liability of the appellant to the owner of the lorry in respect of any accident was limited to the sum of Rs. 20,000/-.

On the 29th March, 1950, the respondent formally gave notice to the appellant of his action against the owner which he had commenced against the latter two days earlier. This notice was given in accordance with the requirements of section 134 of the Motor Car Ordinance (section 106 of the Motor Traffic Act, 14 of 1951). On the 24th of September, 1951, the respondent obtained judgment against the owner for Rs. 30,000/- and sought to enforce it against the appellant in terms of section 133 of the Motor Car Ordinance, 45 of 1938 (section 105 of the Motor Traffic Act, 14 of 1951).

On the 1st September, 1951, the Motor Car Ordinance was repealed and replaced by the Motor Traffic Act, 14 of 1951. The Act of 1951 contained no transitional provisions capable of preserving the right of the respondent which originated under the 1938 Ordinance.

It was argued for the appellant : (1) that the respondent had only a statutory right to claim direct against the appellant under the Motor Car Ordinance, 45 of 1938 and that as the statute under which he gave notice of the action to the appellant had been repealed before he obtained judgment against the owner, he could not now assert any statutory right under it. It was also argued for the appellant : (2) that the liability of the appellant to the respondent was limited to the sum of Rs. 20,000/-

Held : (1) That the case fell within the meaning of section 6 (3) (*b*) of the Interpretation Ordinance and that the repeal of the Motor Car Ordinance, 45 of 1938, did not affect the right which the respondent had acquired against the appellant under that Ordinance.

(2) That section 133 of the Motor Car Ordinance, 45 of 1948 (section 105 of the Motor Traffic Act, 14 of 1951), did not render the appellant liable to the respondent for a sum greater than Rs. 20,000/-, for which the appellant was liable to the owner of the lorry in accordance with section 128 of the Motor Car Ordinance, 45 of 1938 (section 100 of the Motor Traffic Act, 14 of 1951).

Cases referred to: *Central Electricty Board* v. *Halifax Corpn.* 1962 (3) W.L.R. 1313 ; 1963 A.C. 785; 1962 (3) A.E.R. 915
Director of Public Works v. *Ho Po Sang,* 1961 A.C. 901 ; 1961 (2) A.E.R. 791 ; 1961 (3) W.L.R. 39

Michael Kerr, Q.C., with *R. A. MacCrindle, Q.C.,* and *Christopher Owen* for the appellant.

No appearance for the respondent.

LORD EVERSHED

This appeal arises out of a road accident in Ceylon which took place more than 15 1/2 years ago. On the 29th March, 1948, a lorry driver, being an employee of one A. M. Appuhamy, collided with a motor car driven by Mr. A. E. Ranasinghe (the respondent before the Board) as a result of which the respondent suffered substantial bodily injuries. It is not now in doubt that the collision was occasioned by the negligence of the lorry driver and the damages eventually awarded by the Supreme Court of Ceylon against Mr. Appuhamy amounted to Rs. 30,000. Their Lordships cannot but feel a considerable sympathy for the unfortunate respondent who (so far as Their Lordships know) has so far received nothing whatever in respect of the damage which he suffered and who, whether for financial reasons or otherwise, has not been represented before the Board on this appeal.

It was at the relevant date and is the law in Ceylon (as it was and is in England) that the user of a motor vehicle must be insured as regards injuries resulting to third parties from accidents of the kind which occurred in this case—what are generally called third party risks. At the date in question Mr. Appuhamy was so insured with the appellant insurance company for one year from the 22nd February, 1948, by virtue of a policy dated 15th March of that year ; but the liability of the appellants to the assured in respect of any one accident of the kind which in this case occurred was, in due accordance with the terms of the relevant Ceylon legislation, limited to the sum of Rs. 20,000.

Under the relevant Ceylon legislation (as under the corresponding English legislation) a third party injured by the insured person is given upon certain terms and conditions the right to claim payment of the amount of his damages direct from the insurance company concerned and the claim in the action from which the present appeal arises was such a claim by the respondent. Before the Board, as in the Courts below, two distinct points were taken by the appellants, namely (1) that having regard to the repeal of the relevant Ceylon legislation in force at the time of the accident and before the decrees in favour of the respondent of the District Court and the Supreme Court in the action brought by him against Mr. Appuhamy, the appellants were not under any liability to the respondent; and (2), that if the appellants were liable to the respondent then their liability was limited to the sum of Rs. 20,000. Both these questions were decided adversely to the appellants by the District Court and also by the Supreme Court in Ceylon.

It becomes now necessary to refer to the relevant provisions of the Ceylon legislation. At the date of the accident there was in force the Motor Car Ordinance, No. 45 of 1938, Part VIII of which (sections 127 to 149 inclusive) related to insurance against third party risks. This Ordinance was replaced by the Motor Traffic Act of 1951, the date upon which the repeal of the Ordinance took effect and the 1951 Act came into operation being the 1st September, 1951. The subject of insurance against third party risks was covered by Part VI of the 1951 Act (sections 99-121 inclusive). The language of the relevant sections in the 1951 Act was, however, for all practical purposes, identical with that of the replaced sections in the 1938 Ordinance. It will, therefore, only be necessary for Their Lordships to refer to the sections in the 1938 Ordinance giving where necessary the number of the corresponding sections in the 1951 Act. It may be noted—and the point is of some relevance upon the second of the questions above formulated—that the relevant language of the Ceylon legislation followed closely that of the English Road Traffic Act, 1934.

Section 127 of the 1938 Ordinance (section 99 of the Act of 1951) required users of motor cars to be insured against third party risks. By section 128 of the 1938 Ordinance as amended at the relevant date (section 100 of the 1951 Act) it was provided (sub-section 1) that " in order to conform with the requirements of this Part a policy of insurance in relation to the use of a motor car must be a policy which . . . ; (*b*) insures in accordance with the provisions of paragraph (*c*) (the insured person or persons) . . . in respect of any liability which may be incurred by him or them in respect of . . . bodily injury to any person caused by or arising out of the use of the motor car on a highway ; and (*c*) . . . (ii) in the case of a lorry covers any liability which is referred to in paragraph (*b*) and which may be incurred in respect of any one accident up to an amount which shall not be less than Rs. 20,000". The proviso to the sub-section excepted from the requirements of the section liabilities in respect of employed persons contractual liabilities and (save as stated) liabilities for injury to persons getting in or out of the motor car. Sub-section 4 of the section provided that for the effectiveness of a policy there must be issued by the insurers

to the assured "a certificate in the prescribed form" containing *inter alia* particulars of any conditions to which the policy was subject. It may here be observed that so far as is known no regulations were ever made under either the 1938 Ordinance or the 1951 Act prescribing the precise form of the certificate last mentioned but it is not in doubt that in the present case the appellants had in 1948 issued to Mr. Appuhamy a certificate in the form which was accepted in Ceylon as proper and appropriate.

It was section 133 of the 1938 Ordinance (section 105 of the 1951 Act) which imposed liability upon insurers direct to injured third parties. In the circumstances the section should be set out in full :

> "133. (1) If after a certificate of insurance has been issued under section 128 (4) to the persons by whom a policy has been effected, a decree in respect of any such liability as is required by section 128 (1) (*b*) to be covered by a policy of insurance (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of sections 134 to 137, pay to the persons entitled to the benefit of the decree any sum payable thereunder in respect of that liability, including an amount payable in respect of costs and any sum payable in respect of interest on that sum under such decree.
>
> (2) In this section 'liability covered by the terms of the policy' means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy".

By section 134 of the 1938 Ordinance (section 106 of the 1951 Act) the insurers were not liable to an injured third party in respect of the decree unless within seven days after the commencement of the action in which the decree was entered notice had been given to the insurer by a party to the action.

There follow two sections absolving the insurer from liability to third parties in certain events. Section 138 of the 1938 Ordinance (section 110 of the 1951 Act) must also be set out in full :

> "138. If the amount which an insurer becomes liable under section 133 to pay in respect of a liability of a person insured by a policy exceeds the amount for which he would, apart from the provisions of that section, be liable under the policy in respect of that liability, he shall be entitled to recover the excess from that person."

Finally, by section 140 of the 1938 Ordinance (section 112 of the 1951 Act) provision is made in the event of the assured becoming insolvent or compounding with his creditors whereby the rights of the insured against the insurer should vest in an injured third party.

Their Lordships turn now to the first point taken by the appellants. As already stated the accident occurred on the 29th March, 1948. On the 27th March, 1950, the respondent began his action against Mr. Appuhamy and two days later (viz., on the 29th March, 1950) he gave formal notice to the appellants of that fact enclosing a copy of his plaint in the action. A defence to the respondent's claim was put in by Mr. Appuhamy on the 4th August, 1950, but it may be observed that there is nothing to show that Mr. Appuhamy's defence was handled, in fact, by the appellants. On the 24th September, 1951, the respondent obtained judgment from the District Court for Rs. 15,000 damages. The respondent appealed against the quantum of damages awarded and on the 17th May, 1956, the Supreme Court allowed his appeal increasing his award to Rs. 30,000. It appears that in January, 1957, the respondent obtained leave to levy execution for his damages against Mr. Appuhamy but it is not known whether anything has ever, in fact, been recovered thereunder. On the 17th September, 1957, the respondent commenced his action against the appellants obtaining judgment for Rs. 30,000 and costs from the District Court on the 6th March, 1959 ; and the appellants' appeal to the Supreme Court against that judgment was dismissed on the 27th September, 1961.

From the dates which Their Lordships have been given it will be observed that shortly before the decree of the District Court was obtained by the respondent against Mr. Appuhamy, namely on the 1st September 1951, the Ordinance of 1938 was repealed and replaced by the Act of 1951 and it is upon this fact that the appellants' first point is founded.

It has been strenuously contended on their part that the only right which the respondent has to claim direct against the appellants for the damage he has suffered is one exclusively based on statute ; that at the time of the accident and at the time when he gave notice of his action against Mr. Appuhamy the matter was governed by the Ordinance of 1938 ; that since the 1938 Ordinance had been repealed (and was repealed before any decree was obtained by him against Mr. Appuhamy) he cannot now assert and statutory right under that Ordinance ; and that he

must therefore claim exclusively under the Act of 1951 the terms of which cannot upon the fair meaning of the words used in the relevant section cover his claim. The relevant section for the purposes of the respondent's claim is section 105 of the 1951 Act which replaced section 133 of the 1938 Ordinance and, it is claimed, by the terms of that section the essential condition of a claim is that a certificate of insurance should have been "issued under section 104 (1)" of that Act; whereas, in fact, the only relevant certificate in the present case was one issued in 1948 and, therefore, in no sense "under" the Act of 1951 which did not come into force until 3 1/2 years later. Finally, it is (with truth) pointed out on the appellants' part that the 1951 Act contains no transitional provisions designed to preserve or capable of preserving the rights or claims of the kind involved in the present case originating under the 1938 Ordinance.

Their Lordships would indeed be sorry if they were compelled to hold that the term of the Ceylon legislation were such as to deprive the respondent in the present case of any right to claim against the appellants; but notwithstanding the arguments addressed to them they are satisfied that the Supreme Court (and the District Court) were entitled to reject the appellants' claim by an invocation of the terms of section 6 (3) of the Ceylon Interpretation Ordinance (Cap. 2) of 1900. By that sub-section it is provided:

> "(3) Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected—
>
> (*a*) the past operation of or anything duly done or suffered under the repealed written law;
>
> (*b*) any offence committed, any right, liberty, or penalty acquired or incurred under the repealed written law;
>
> (*c*) any action, proceeding or thing pending or incompleted when the repealing written law comes into operation, but every such action, proceeding or thing may be carried on and completed as if there had been no such repeal."

The Board respectfully agrees with the Supreme Court in thinking that the respondent had on the 1st September, 1951, "acquired a right" against the appellants within the meaning of paragraph (*b*) of that sub-section. The attention of Their Lordships was drawn to a number of cases including those referred to in the judgment of Gunasekara J. in the Ceylon Supreme Court and including also the case in the House of Lords of the *Central Electricity Board* v. *Halifax Corpn.*, (1962) 3 W.L.R. 1313. The distinction between what is and what is not "a right" must often be one of great fineness. But Their Lordships agree with Gunasekara J. in thinking that on the 1st September 1951 the respondent had as against the appellants something more than a mere hope or expectation—that he had in truth a right, within the contemplation of section 6 (3) (*b*) of the Interpretation Ordinance, under section 133 of the Ordinance of 1938 although that right might fairly be called inchoate or contingent. In the case of *Director of Public Works* v. *Ho Po Sang*, (1961) A.C. 901, the Board was concerned with an analogous problem under the language (closely approximating to that of the Ceylon Interpretation Ordinance) of the Interpretation Ordinance of Hong Kong. Their Lordships are well content to accept and adopt the language used by Lord Morris of Borth-y-Gest in the judgment of the Board in that case (see page 922 of the Report). "It may be . . . that a right has been given but that in respect of it some investigation or legal proceeding is necessary. The right is then unaffected or preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given". In the present case, as it seems to the Board, the appellants cannot now be heard to say that the respondent was not immediately after the accident an injured third party entitled to recover damages against Mr. Appuhamy and, as they think, his service upon the appellants of the notice of his claim (together with a copy of his plaint) pursuant to section 134 of the 1938 Ordinance was an assertion by him of his statutory right against the appellants; and nonetheless effectively so because the quantum of his claim was dependent upon the finding of the Court in a decree made in his favour in his action against Mr. Appuhamy.

Their Lordships are, therefore, of opinion that, for the reasons given by Gunasekera J. the Supreme Court was justified in holding as it did upon the first of the questions raised by the appellants that the case fell within the terms of section 6 (3) (*b*) of the Interpretation Ordinance and they do not find it necessary to express any view whether, as the District Judge held, the service by the respondent of his notice upon the appellants might not also fairly be treated as constituting a "proceeding" within the terms of

section 6 (3) (*c*) which was " incompleted " when the repeal of the 1938 Ordinance took effect. Their Lordships add that even if the case were not covered by section 6 of the Interpretation Ordinance it does not necessarily follow that the appellants should succeed upon this point. The vital words of section 105 (1) of the Act of 1951 (section 133 (1) of the 1938 Ordinance) are " if a certificate of insurance has been issued under section 100 (4) ". The latter sub-section, however, does no more (as did not the corresponding sub-section (4) of section 128 of the 1938 Ordinance) than require the issue of a certificate in " the prescribed form ". As already stated there appear never to have been any regulations under either piece of legislation prescribing the form to be used. It may, therefore, well be said that the words " under section 100 (4) " should be construed as meaning no more than " as contemplated by " that sub-section and, if so, that the relevant certificate issued by the appellants in 1948 satisfied the statutory requirement under the 1951 Act. Indeed, unless it were so, the remarkable result would seem to flow from the coming into force of the 1951 Act that all motor car users would be instantly disqualified by virtue of section 99 of the Act from using their motor cars because there was not in force a policy of insurance in respect of third party risks in conformity with the requirements " of this Part " of the Act. But in the circumstances it is unnecessary for their Lordships to express a final conclusion upon this point.

Upon the second question—whether the liability of the insurers should be limited to Rs. 20,000—their Lordships have felt much greater difficulty and have in the end come to the conclusion that in this respect the appellants' argument is well founded. True it is that the term of sections 133 and 138 of the 1938 Ordinance (sections 105 and 110 of the 1951 Act) seem at first sight to provide the answer ; for the latter section undoubtedly contemplates a payment by the insurer to a third party in excess of the insurer's liability to the person insured and section 133 requires that the insurers " shall . . . pay to the persons entitled to the benefit of the decree any sum payable thereunder " (that is under the decree) " in respect of the liability " ; and it may be forcibly contended that the Rs. 30,000 awarded by the Supreme Court was awarded " in respect of the liability " of Mr. Appuhamy to the respondent. Their Lordships have not had the advantage of hearing any argument on the part of the respondent but in the end have felt compelled to reject this view. In approaching the problem Their Lordships are impressed by the reflection that it would appear as a matter of principle unlikely that a third party having no contract with the insurers should yet be entitled to recover from the insurers a sum greater than the limit imposed by the insurer, properly in accordance with the Ordinance, in the policy of insurance. Second they note that the " liability " referred to in section 133 is by the terms of sub-section (1) a " liability *required* by section 128 (1) (*b*) to be covered by a policy of insurance ". It is, therefore, necessary to turn back to section 128 and it is to be observed that the terms of paragraph (*b*) of sub-section (1) expressly incorporate the succeeding paragraph (*c*). It therefore follows that in the case of a lorry the liability " required " to be covered is a liability which shall not be less than Rs. 20,000 but need not exceed that figure—so that any liability in the present case (having regard to the terms of the policy) in excess of Rs. 20,000 was not one " required " to be covered by the policy.

There remains, however, the language of section 138 ; and if it were shewn that a payment by the insurer to a third party cannot within the contemplation of the provisions of Part VIII of the Ordinance of 1938 (Part VI of the 1951 Act) be in excess of the insurers' liability under his policy of insurance save in a case such as the present it would be a very strong, if not a conclusive, argument against the view for which the appellants contended. But in truth there are undoubtedly other cases which might arise under the relevant Part of the Ordinance (or of the Act where the insurer's statutory obligation to a third party might exceed his contractual liability under the Policy. One such instance may be found to arise from the proviso already noticed to section 128 of the Ordinance itself (section 100 of the Act) which exempts from what is " required " by the section to be covered, liability in respect of persons in the employment of the insured, contractual liabilities and certain liabilities in respect of persons getting in or out of the motor car. Another instance may be derived from section 130 of the Ordinance (section 102 of the Act) which provides that certain conditions may be made in policies effectively limiting the insurers' liability to the assured under section 128 of the Ordinance (section 100 of the Act), namely, the conditions indicated in sub-section (4) thereof ; for example, by excluding the use of the motor car for certain business purposes. One effect of the sub-section, therefore, is that liability which may be excluded by the conditions therein mentioned is not liability " required " to be covered by section 128 of the

Ordinance. In their Lordships view it would be strange—and, indeed, capricious—if though in cases arising under section 137 the insurer may limit his liability to the third party to the amount of his liability to the assured, there were no corresponding escape for the insurer in cases such as the present or in cases arising under the proviso to section 128. In their Lordships opinion these anomalies are avoided if proper effect be given to the essential word " required " in section 133 of the Ordinance and the corresponding use of the word " requirements " in section 128. A third instance may be found in section 137 of the Ordinance (section 109 of the Act) which excuse the insurer from liability to a third party (for example) if he has within a stated period of time given notice of declaration duly obtained by the insurer from a Court of competent jurisdiction that there has been a breach by the insured of one of the conditions above-mentioned in section 130 (4) ; for the case may well occur where an insurer has failed to give notice in due time. Finally Their Lordships observe that paragraph (*b*) of the proviso to sub-section (3) to section 140 already referred to (relating to the vesting in the third party of the rights under his policy of an assured who is insolvent) in terms contemplates the case where the resulting liability of the insurer to the third party is greater than his liability under the policy.

Their Lordships add to what they already said one further consideration. As already observed the language of the Ordinance of 1938 (and of the Act of 1951) generally follows closely that of the English Road Traffic Act of 1934 ; and this is clearly true of section 138 of the Ordinance (section 110 of the Act) the general purpose and sense of which are identical with those of section 10 (1) of the English Road Traffic Act of 1934, the language being also closely followed. Yet in the English Act there is no power conferred for limiting the liability of the insurer to the insured person under a contract of insurance as regards third parties to some specific figure for any one accident corresponding to the power contained in section 128 (1) (*c*) of the Ordinance, (section 100 (1) (*c*) of the Act).

From the examples given (and Their Lordships do not think they are exhaustive) it seems to the Board clear that circumstances may well arise, apart altogether from the case of limitation of liability in respect of a lorry, in which the insurer might be ordered to pay to a third party sums in excess of the insurer's liability to the assured. It is then necessary to look again at section 128 of the Ordinance—the vital section for the purpose of the present argument ; and having regard to the use of the words " required to be covered " in section 133 of the Ordinance (section 105 of the Act) their Lordships find it impossible to reject the appellants' argument that the latter section does not render in such a case as the present the insurer liable to the third party for a greater sum than that for which he is liable (in due accordance with section 128 of the Ordinance) to the assured.

Their Lordships, therefore, while rejecting the appellants' argument on the main point presented on their behalf think that the appeal should be allowed to the extent of reducing the amount payable by the appellants to the respondent to Rs. 20,000 and they will humbly advise Her Majesty accordingly. In the circumstances of the case no order is made as to the costs of this appeal.

Varied.

Present : **Herat, J.**

ODIRIS APPUHAMY *vs.* P. B. UMBICHY

S.C. 14/'62—*Labour Tribunal Case No.* 4/9559.

Argued and decided on : 1st April, 1963.

Industrial Disputes Act, as amended by Act No. 62 *of* 1957, *section* 37—" *All costs incidental to any proceedings* " *in that section—Meaning thereof.*

Question of law not certified but appearing on face of record—Will Supreme Court permit it to be raised at hearing ?

Application to Labour Tribunal against dead person—Whether a nullity.

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* For Sinhala translation, see Sinhala section, Vol. 7 part 4, p. 15

Held : (1) That the Supreme Court will permit a question of law to be raised at the hearing of an appeal even though not certified, if it is apparent from the material on the face of the record.

(2) That the phrase " all costs incidental to any proceedings " in section 37 of the Industrial Disputes Act (Chap. 37) must be construed as including jurisdiction to make an order as regard final costs relating to the main application and not merely on an interlocutory or incidental matter.

(3) That an application to the Labour Tribunal claiming relief against a dead persen is a nullity and any order made by the President is without jurisdiction.

Case referred to: *Punjab National Bank* v. *Sri Ram Kunwar*, A.I.R. (1967) S.C. 267.

D. S. Wijesinghe, for the applicant-appellant.

M. T. M. Sivardeen with *N. M. S. Jayawickrama* and *M. L. A. Refai*, for the employer-respondent.

HERAT, J.

In this case the applicant-appellant filed proceedings before the Labour Tribunal making a claim against P. B. Umbichy. The President of the Tribunal dismissed the applicant's claim and ordered him to pay a sum of Rs. 105/-, as costs.

The appeal is argued by learned counsel for the applicant-appellant on two points of law, one of which is certified and the other which though not certified appears on the face of the record. It is my view that this Court will permit a question of law to be raised even though not certified if it is apparent from the material on the face of the record. I have, therefore, permitted the second question of law also to be argued.

The first question of law turns on the interpretation to be attached to a phrase in section 37 of the Industrial Disputes Act (Chapter 37), which reads as follows :—" All costs incidental to any proceedings before an arbitrator or an Industrial Court shall, subject to regulations made under this Act, be in the discretion of such arbitrator or Court, as the case may be ". By Amendment Act, No. 62 of 1957, the above provision has been extended to include the President of a Labour Tribunal.

Mr. Wijesinghe argues that the word " incidental " must refer to costs which do not arise out of the main event or proceeding but not of some interlocutory or incidental matter. He cites in support a judgment reported in A.I.R. (1957) S.C. 276, to the effect that costs in incidental proceedings must be distinguished from costs in the main proceedings. The phraseology of the Indian section is somewhat different to our section. The Indian section reads as, " Costs incidental to proceedings ", clearly showing that the Legislature in India had two types of costs in mind, namely, costs of the main proceedings and costs of incidental proceedings. For some reason or other our section only refers to costs incidental to proceedings. I find it difficult to believe that our Legislature intended to give a discretion to a President of a Labour Tribunal to give him jurisdiction to make an order for costs purely in interlocutory matters and not to give him any discretion or jurisdiction to make an order for costs as regards a main event. Therefore, in my view, the phrase in our section must be construed as including jurisdiction to make an order as regards final costs or the costs relating to the main application.

The appeal, therefore, on the first point of law fails. The second point of law which arises on the face of the record is as follows. The application as I said earlier was against one P. B. Umbichy, who was a very well-known business man in Colombo. He died in 1936 long before the present application was made. The present application was, therefore, against a dead person and was a nullity and the President of the Tribunal should have accordingly treated it as a nullity and refused to proceed any further. Instead of doing so he seems to have entertained the application, because the people who are now carrying on the business which P. B. Umbichy originally carried on thought it fit to resist the application, but nevertheless as in the eye of the law an application against a dead person is a nullity, then a Tribunal must treat such a nullity as a nullity.

In my view, therefore, the Tribunal had no jurisdiction to proceed with this nullity and the order made by the President is also a nullity being one made without jurisdiction. I cannot allow an appeal from a nullity, but I declare the order for costs made in favour of the so-called respondent against the appellant a nullity and leave the matter at that.

Proceedings held to be a nullity.

IN THE COURT OF CRIMINAL APPEAL

Present : **Basnayake, C.J. (President), Weerasooriya, S.P.J., and Abeyesundere, J.**

THE QUEEN *vs.* ELIYADURA RUBAN MATHEW DE SOYSA

Appeal No. 53 *of* 1963, *Application No.* 54 *of* 1963—*S.C. No.* 184, *M.C. Kanuwana, No.* 4065.

Argued on : August 19, 20, 21, 22 and 23, 1963, when conviction was quashed and judgment of acquittal entered.

Reasons delivered on : 4th November, 1963.

Court of Criminal Appeal—Charge of murder—Summing-up—Suggested motive unsupported by evidence—Non-direction amounting to misdirection—Items of evidence against the accused put to the jury without connected items in his favour—Misdirection.

Held : (1) That where a motive is suggested, but not substantiated by the evidence, the judge should have directed the jury not to pay any attention to it and failure to do so amounted to a misdirection.

(2) That where items of evidence which by themselves would give rise to inferences adverse to the accused are placed before the jury, it is a misdirection to fail to point out connected items of evidence which are in his favour.

Case referred to : *Nina Vassileva*, 6 Criminal Appeal Reports (Eng.) 228.

Colvin R. de Silva with *A. C. M. Ameer, Varuna Basnayake* and *Hannan Ismail* (*assigned*), for the accused-appellant.

H. A. G. de Silva, Crown Counsel, for the Attorney-General.

WEERASOORIYA, S. P. J.

The appellant was tried at the Assizes held at Negombo on a charge of having committed murder by causing the death of one Sidney Gunasekere. By a majority of 6-1 the Jury found him guilty of the offence and he was sentenced to death. He has filed this appeal and application against his conviction and sentence. At the conclusion of the argument before us we set aside the conviction of the appellant and the sentence passed on him, and directed that judgment of acquittal be entered in his favour. We now set out the reasons for our order.

The deceased was at the time of the murder residing on a land which abutted the Colombo-Negombo Road. The appellant and his family lived about a quarter-mile away. He had a garage adjoining the deceased's residence where he carried on the business of motor car repairs. Car sales were regularly conducted there on Sundays, on such occasions the appellant being assisted by one Leopold Mendis. The land on which the garage stood also extended up to the main road, on the Colombo side of the deceased's land. Next to the garage, but separated off by a fence, was a row of rooms in the first of which (nearest the garage) there was the shop of a florist and an undertaker, while in the second room the appellant ran a provision boutique which was looked after by two of his employees Rupasinghe and Nandasena.

Adjoining the deceased's residing land on the Negombo side is the house where the prosecution witness Catherine Mendis lived with her husband and a grown up son. The evidence of Catherine Mendis is that when she was asleep on the night of the 6th May, 1962, she was awakened at about 9.30 by the banging of doors and windows and some one calling out " Mahataya, Mahataya ". She then came on to the compound of her house and looked in the direction of the deceased's house and saw the appellant and Leopold Mendis going round it, banging the doors and windows.

They were calling out " Mahataya, mahataya ". There appeared to be no one in the house, and the appellant and Leopold Mendis then went towards the appellant's garage. Catherine Mendis claimed to have identified them by the light of an electric lamp which was lit in the verandah of the deceased's house. There was also a big street lamp in front of her house the light from which fell as far as the garage. About a quarter or half an hour later the appellant and Leopold Mendis again went to the deceased's house. They switched off the electric light in the verandah. They again banged at the doors and windows and also at the trellis on the side towards the house of Catherine Mendis. Part of the trellis gave way and the appellant and Leopold Mendis entered the house through the damaged portion. After that Catherine Mendis heard articles being broken inside. They then opened the front door and came out of the house and returned towards the garage. A little while later the deceased came in his car and halted it on the road between the entrance to his land and the entrance to the garage premises. He got down from the car and walked up to his house, which was in darkness, and was seen to flash his torch inside it. Thereafter he came out and went in the direction of the car, when the appellant and Leopold Mendis set upon him and assaulted him. The appellant is said to have struck the deceased with a weapon like P 1, while Leopold Mendis gave him a blow with a torch. Then they dragged him towards the garage where they subjected him to a second assault. Leopold Mendis appears to have struck the deceased, at least, one blow on that occasion, too. The deceased fell, and the appellant alone continued to deal him some more blows with the weapon which he had. Each of the assailants then got into a car and went in the direction of the Kandana Police Station.

After they had gone Catherine Mendis went back to her house. Her husband and her son were asleep. She got into bed and was cogitating on what she had seen, when the deceased's son, Malcolm, a young man of about 28 years, knocked at the door of her house. On her opening the door he told her " Father has been murdered, come let us go and see ". He also told her that when returning home he heard of the assault. Catherine Mendis says that as she was frightened to leave her house, she asked Malcolm to go to the Police Station. She did not tell Malcolm that she had seen the assault. Before Malcolm could go to the Police Station the Police arrived at the scene as a result of certain information given by the appellant at the Kandana Police Station. Catherine Mendis was questioned by the Police only on the morning of the 7th May. She admits that in her statement she said that she did not see the assault. Under cross-examination as to why she said so she first explained that it was due to fear because on the afternoon of the 6th May she was threatened with death by the younger brother of her daughter's husband, who is also related as a cousin to the appellant. When it was pointed out to her that even if such a threat was uttered it was over a land dispute in which the appellant was in no way involved, she came out with the further explanation that on the morning of the 7th May one Peduru Alwis, an uncle of the appellant, had threatened her not to give evidence. She was unable to say whether Peduru Alwis knew at the time that she had seen the assault on the deceased.

Leopold Mendis was produced by the Police as a suspect before the Magistrate on the 8th May, 1962, and remanded, but one week later on the application of the Police he was released from custody. On the same day the Police filed a report under section 148 (1) (*b*) of the Criminal Procedure Code charging the appellant and Rupasinghe with the murder of the deceased. Rupasinghe was discharged in the course of the non-summary inquiry. The name of Catherine Mendis was, for obvious reasons, not listed as a witness in the Police report. In her absence, it is not clear on what evidence the Police relied when they charged Rupasinghe as well as the appellant with the murder of the deceased. On the 19th May, 1962, she went to the Police Station and volunteered a statement and she subsequently gave evidence at the non-summary inquiry. She was the only prosecution witness called at the trial who claimed to have seen the assault on the deceased.

Malcolm Gunasekere, who was also called as a witness for the prosecution at the trial, stated that on the night of the murder he and the deceased were the sole occupants of the deceased's house, that in the evening they went to see his aunt who lived close by and that deceased returned home ahead of him. Malcolm left his aunt's house some time later and was walking home when he got information at the Welisara hospital gate about the assault on his father. He then proceeded along the road until he came up to where his father lay fallen. He knocked at the undertaker's shop but as there was no response he went in the other direction and knocked at the

door of Catherine Mendis' house. When she opened the door he told her that his father had been murdered and she asked him to go to the Police station. When he was about to go to the Police Station a Police jeep arrived with the Police.

One of the matters which the prosecution hoped to establish by calling Malcolm was the motive for the accused to have killed the deceased. But Malcolm did not give the evidence expected of him. On the contrary, he was definite that the appellant and the deceased were throughout on the best of terms. In cross-examination it was put to him that the deceased had been previously assaulted by others who were not well disposed towards him. He admitted that the deceased had been assaulted once, but said that the incident took place a long time ago. It was, however, elicited by the defence from Dr. Udawatte, who performed the post-mortem examination on the body of the deceased, that a few days before the 6th May, 1962, the deceased was admitted to the hospital with a history of having been assaulted. There is no evidence as to who assaulted the deceased on that occasion. Apparently the fatal assault on the 6th May, 1962, took place within a day or two after the deceased was discharged from hospital.

Among the injuries which the deceased sustained as a result of the assault on the 6th May, 1962, were several of a non-grievous nature. Two of them consisted of a series of parallel contusions which Dr. Udawatte thought could well have been caused by blows with P 1, which is described as an iron steering rod one end of which was grooved. The fatal injuries were a contusion of the scalp, two inches in diameter on the back of the head, with a fracture of the occipital bone and haemorrhage over the membranes covering the brain, and a large contusion on the left side of the chest underlying which there were fractures of the 6th, 7th, 8th and 9th ribs, haemorrhage round the area of the heart, contusion of the lower lobe of the left lung, contusion of the wall of the stomach and diaphragm and laceration of the spleen and the left kidney.

Catherine Mendis stated in her evidence that although she saw the appellant strike the deceased as many as ten or twelve blows with a weapon like P 1, she was unable to specify on which part of his body any blow alighted. She also said that Leopold Mendis gave the deceased two blows with the torch which he had, that the blows were dealt from in front of the deceased and one of them alighted on the face. In the opinion of Dr. Udawatte the contusion and fracture on the back of the deceased's head could have been caused by a blow with a torch. Even if the blow dealt by Leopold Mendis which alighted on the deceased's face could not have caused the injury on the back of his head, there was one other blow dealt by him which could have accounted for that injury. Dr. Udawatte was not questioned whether such an injury could have been caused by an assailant standing in front of the deceased. In the absence of an opinion to the contrary from the doctor, there would appear to be no reason for excluding the possibility that a blow dealt by Leopold Mendis had caused that injury. As for the larger contusion on the left side of the deceased's chest and the underlying internal injuries, Dr. Udawatte said that they could have been caused with P 1, but he seemed to think it more probable that they were caused by repeated blows with a fist or by the deceased having been trampled on while he lay fallen. If any weight is to be attached to this opinion, it would appear that the appellant was not the person who caused these injuries, for Catherine Mendis did not say that the assault on the deceased by the appellant was carried out by any means other than a weapon like P 1. In determining the responsibility of the appellant for the fatal injuries on the deceased, the Jury had before them the evidence of Catherine Mendis as to the part played by Leopold Mendis in the assault, which evidence they were under a duty to consider, notwithstanding that the Police had elected not to proceed against Leopold. At the trial the prosecution sought to hold the appellant responsible for the fatal injuries on the deceased on the footing that they were inflicted by the appellant and not by Leopold Mendis. This being the case which the appellant was called

upon to meet, it must be assumed that the verdict of the Jury finding the appellant guilty of murder was returned on that footing, *i.e.*, they found as a fact established beyond reasonable doubt that the appellant by his own hand inflicted the fatal injuries on the deceased. It is difficult to understand how the Jury could have arrived at such a finding, unsupported as it is by the evidence of Catherine Mendis and also the opinion expressed by Dr. Udawatte as stated earlier.

The verdict of the Jury was challenged by counsel for the appellant at the hearing of the appeal, not only on the ground that it was unreasonable, but also on grounds of misdirection by the trial Judge. We do not think it necessary to deal with all the grounds of misdirection in regard to which submissions were addressed to us. There can be no doubt that the case for the prosecution contained many infirmities on a consideration of which the Jury could well have returned a verdict of not guilty in favour of the appellant. They were, the generally unsatisfactory evidence of Catherine Mendis, her delay in coming forward as a witness after having in the first instance denied any knowledge of the assault on the deceased, the absence of a motive for the appellant to have assaulted the deceased and the fact that a few days prior to the 6th May, 1962, the deceased had been the victim of an assault by some unknown person or persons.

In discussing the question of motive the trial Judge rightly told the Jury that the Crown had failed to prove the motive which it set out to prove. But in this connection he referred to the evidence of Malcolm Gunasekere that the deceased carried on the business of selling second-hand cars, and to the appellant's evidence that he, too, carried on a similar business at his garage on Sundays and that on the evening of 6th May, 1962, which was a Sunday, there had been such a sale. In regard to this evidence the Judge stated as follows :—

> " Now, Gentlemen, the Crown has not established any motive, but the Crown suggests could it be that outwardly the accused and the deceased were friendly, but they are rival car dealers. On the evening of this day till 6.30 there was a car sale, the car sale conducted by the accused in which he was assisted by Leopold Mendis. *Did something go wrong in this car sale which made the accused suspect that the deceased had something to do with that* ? That only remains a suggestion and there is no proof . . . ".

This suggestion is based on the following propositions—(*a*) that there was rivalry between the deceased and the appellant over car sales ; (*b*) that the car sale held by the appellant on the evening of the 6th May, 1962, was not a success ; and (*c*) that the deceased was in some way responsible for its failure. There is not an iota of evidence in support of any of these propositions, nor were they even put to the appellant in cross-examination when he gave evidence on his own behalf. In the circumstances, if Crown Counsel suggested such a motive for the consideration of the Jury, as the above quoted passage from the summing-up indicates, it represented nothing more than a figment of his imagination, and the only direction which the Judge should have given to the Jury regarding the suggestion was not to pay any attention whatever to it. In our opinion, the omission to do so amounted to a misdirection.

Malcolm Gunasekere stated in his evidence that a short while after he arrived at the spot where the deceased lay fallen, which was between 11 p.m. and 12 midnight, the appellant, too, came there, that he asked the appellant why he had killed the deceased, that the appellant replied " I do not know " and abruptly left the place. Seeing that according to Malcolm there was " no earthly reason " for the appellant to have assaulted the deceased, it is not clear why such a question should have been put to him. At the trial much seems to have been made by the prosecution of the appellant's reply as amounting to an admission of guilt. The learned trial Judge asked the Jury to consider whether the reply given by the appellant and his general behaviour at the scene were not items of circumstantial evidence which established that the appellant was the person who inflicted the injuries on the deceased. In particular he asked the Jury to consider whether the appellant, if innocent, would not have offered to take the deceased to hospital, and he even commented adversely on the appellant having left the scene at that stage. But in regard to the alleged admission of guilt by the appellant, apart from the inherent improbability of the evidence of Malcolm on this point, the Judge omitted to draw the attention of the Jury to the cross-examination of Malcolm by appellant's counsel which clearly showed that it was quite unsafe to act on Malcolm's evidence as to the precise question to which the appellant is said to have replied " I do not know". In regard to any adverse inference that the Jury were asked to draw from the conduct of the appellant in not having offered to take the deceased to hospital, the evidence of Malcolm is that when he arrived at the scene and saw the deceased lying there he realised that the deceased was already

dead. The appellant who came there subsequently would also have known that the deceased was beyond any succour. The appellant denied that he met Malcolm there. But even if Malcolm's evidence is accepted in preference to that of the appellant, no useful purpose would have been served in offering to take the deceased to hospital at that stage, and if the appellant, having arrived there and learnt what had happened, left the place abruptly, it would appear that he did so in order to go to the Kandana Police station and give information regarding the matter, which he did at 12.10 a.m. The appellant was cross-examined at length as to why he went to the Police Station only at such a late hour. The explanation given by the appellant may not be entirely truthful and was also the subject of adverse comment by the learned trial Judge, but in considering whether there was any undue delay on the appellant's part from which an inference against him could be drawn, it is relevant to note that up to then Malcolm Gunasekere himself had not gone to the Police Station and given information of what he knew although, according to him, he had been at the scene for a longer time than the appellant.

We think that when the learned Judge gave prominence in his summing-up to the various matters from which, had they stood by themselves, inferences adverse to the appellant might have been drawn, he should also have reminded the Jury of the other connected items of evidence which were in favour of the appellant. His omission to do so would have conveyed to the Jury a misleading impression as to the strength of the case against the appellant, and, in our opinion, amounted to misdirection. See, in this connection, the observations of the Court of Criminal Appeal in England in *Nina Vassileva* (6 Criminal Appeal Reports 228).

Learned counsel for the appellant also complained of the manner in which evidence relating to certain injuries found on the appellant when he was examined by a doctor (not Dr. Udawatte), on the 7th May, 1962, was dealt with in the summing-up. These injuries consisted of two small contusions on the right ring finger, a fairly extensive abrasion on the outer side of the left thigh and a small abrasion on each knee. Apart from these injuries the appellant had a swelling on his upper lip which the doctor had failed to note. The evidence regarding the appellant's injuries was elicited from the doctor by Crown Counsel as tending to show that the appellant was involved in an incident with the deceased as described by Catherine Mendis. There was, however, nothing in her evidence which accounted for the injuries on the appellant. The doctor was questioned whether these injuries could have been accidentally self-inflicted by the appellant when he was assaulting the deceased in the course of a struggle with him, and the doctor discounted such a theory. According to the appellant he got the injuries by falling off his bicycle on the night of the 6th May, 1962, when he was coming from home to his garage to sleep there, as he sometimes used to do. The doctor expressed the opinion that the injuries could very likely have been caused in that way. Regarding this opinion, which was favourable to the appellant, the Judge told the Jury that it had been expressed by the doctor without reference to the swelling on the lip, and he added :

> "It is for you to consider whether that is an injury which is likely to have resulted if the accused fell from his bicycle, and whether if there is an injury to his lip there would also not be some sort of abrasions and injuries to other parts of his face *or knees*."

There seems to be no reason, however, to think that had the doctor noticed the swelling on the appellant's lip, his opinion as to the probable cause of the injuries would have been any different. A swelling on the lip caused by contact with some part of the bicycle when the appellant fell off it, does not appear to be inherently unlikely. As for the observation of the Judge regarding the absence of abrasions on the knees, it was not in accordance with the evidence, for the appellant did have an abrasion on each knee. In our opinion there was misdirection in the manner in which the Judge dealt with the injuries on the appellant.

Having regard to the infirmities in the case for the prosecution to which we have drawn attention, it seemed unlikely to us that the Jury would have convicted the appellant if they had been properly directed. We made order, therefore, quashing the conviction.

Appeal allowed.

Present : **Herat, J., and Sri Skanda Rajah, J.**

KULASURIYA *vs.* LISSIE NONA PERERA & OTHERS*

S.C. 121/'62 (*F*)—*D.C. Panadura*, 7605.

Argued on : 9th and 10th December, 1963.
Decided on : 10th December, 1963.

Bills of Exchange Ordinance, (*Cap.* 82) *sections* 48, 49—*Cheque—Dishonour by non-payment—Failure to give endorser notice of dishonour—Effect.*

A cheque drawn by the 2nd defendant and endorsed by the 1st defendant to the plaintiff was dishonoured on 6th December, 1960. On that very day the plaintiff was informed that the cheque was dishonoured, but she did not give notice of dishonour to the 1st defendant till the 11th January, 1961. The plaintiff and the 1st defendant both resided in the same town.

Held : That as the plaintiff had not proved any special circumstances in terms of section 49 (12) (*a*) of the Bills of Exchange Ordinance, notice of dishonour should have been given or sent off in time to reach the 1st defendant on 7th December, 1960, and as the plaintiff had failed to give due notice of dishonour to the 1st defendant, the plaintiff's action should be dismissed.

C. Ranganathan with *R. Tillakaratne*, for the first defendant-appellant.

Cecil de S. Wijeratne, for the plaintiff-respondent.

Siva Rajaratnam, for the second defendant-respondent.

SRI SKANDA RAJAH, J.

This is an action brought by the plaintiff in respect of a cheque which was endorsed by the first defendant to her.

It would appear that it was a cheque issued on the Bank of Ceylon at Panadura drawn on the 7th September, 1960, and on the back of it is an entry " To be presented on 7.10.60 ". The drawer, the second defendant, the endorser, the first defendant, and the plaintiff are all from Wadduwa, the town adjoining Panadura. The cheque was presented for payment on 6th December, 1960, by D. J. Perera, to whom the plaintiff had endorsed the cheque, and it was dishonoured with the endorsement " Refer to drawer ". On 6th December itself D. J. Perera brought to the notice of the plaintiff that the cheque had been dishonoured. The plaintiff's evidence is that she was told about it on the night of the 6th December. Even the endorser has to be given notice of dishonour—*vide* section 48 of the Bills of Exchange Ordinance. Even if one accepts the evidence of the plaintiff that the notice of dishonour was given to the first defendant on the 11th January, 1961, the question is whether it was due notice of dishonour.

Section 49, sub-section (12) of the Bills of Exchange Ordinance, Chapter 82, reads as follows :—

> " The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter.
>
> In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—
>
> (*a*) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.

As I have already pointed out the drawer, the plaintiff and the first defendant were residing at the same place ; but, the notice of dishonour was given only over one month afterwards. An attempt was made to persuade us to hold that there were special circumstances for the delay in giving notice of dishonour. The special circumstances referred to are an alleged pilgrimage on which the plaintiff went to India. It was also alleged that she returned on the 10th January, 1961, and on the 11th January she gave notice of dishonour. There is no evidence as to when she left on this pilgrimage. We cannot hold that there were special circumstances in this case.

* For Sinhala translation, see Sinhala section, Vol. 7 part 5, p. 17

Notice of dishonour should have been given or sent off in time to reach the 1st defendant on 7th December. We would, therefore, hold that due notice of dishonour was not given.

We, therefore, set aside the judgment of the learned District Judge and enter judgment dismissing the plaintiff's action with costs both here and in the Court below. Costs are payable by the plaintiff-respondent to the first defendant-appellant.

HERAT, J.
I agree.

Set aside.

Present : **Basnayake, C.J., and Abeyesundere, J.**

S. KANAPATHIPILLAI *vs.* E. VETHANAYAGAM

S.C. No. 31/1961—*D.C. Batticaloa, No.* 1487/*L.*

Argued on : September 13, 16 and 17, 1963.
Decided on : September 17, 1963.

Exceptio rei venditae et traditae—Whether doctrine applicable in case of a donation—" Rei vindicatio " action—Validity of gift when donor is not owner—Burden of proving plaintiff's title—Evidence Ordinance, sections 32 (5), 110.

The plaintiff brought a *rei vindicatio* action against the defendant who was admittedly in possession of the property in suit, tracing his title through one Sinnathangam, wife of Sinnathamby, who had donated the property to her. Sinnathamby's title to the property was derived from a Crown Grant which was made to him after he had transferred the property to his wife.

Held : (1) That the exception *exceptio rei venditae et traditae* does not apply in the case of a donation. The donee must take the subject-matter of the gift as it stood at the date of conveyance and if at that time the donor's title to it was bad, the consequent defective title passing to the donee cannot be remedied by the subsequent acquisition of good title by the donor.

(2) That as the defendant has admittedly been in possession of the land in suit for eight years, it is for the plaintiff to establish his title to the land he claims and failure to prove any one link in the chain of title is fatal to his case.

Cases referred to : *Gunatilleke* v. *Fernando*, 22 N.L.R. 385 (P.C.) ; 3 C.L. Rec. 99
Tissera v. *William*, 45 N.L.R. 358 ; XXVII C.L.W. 95
Don Mathes v. *Punchy Hami*, Wendt's Reports 122.

H. W. Jayewardene, Q.C., with *S. C. Crosette-Thambiah* and *N. R. M. Daluwatte*, for the defendant-appellant.

C. Ranganathan, for the plaintiff-respondent.

BASNAYAKE, C.J.

The plaintiff, Eliyathamby Vethanayagam, instituted this action against Sinnathamby Kanapathipillai on the footing that Kasupathy Parigari Clerk Sinnathamby (hereinafter referred to as Sinnathamby) was the owner of garden bearing lot No. 76572 which is depicted in plan No. 2476 in extent 1 acre 2 roods and 28 perches, and that he donated it to his wife, Kathiramalai Sinnathangam, (hereinafter referred to as Sinnathangam) by deed No. 3769, dated 19th November, 1899, attested by K. Kandapody, Notary Public. He also pleaded that on her death intestate leaving property below the value of Rs. 1,000/- her only sister, Kathiramalai Annammai became her sole heir. He claims his rights through Annammai.

The defendant admitted that Sinnathamby became the owner and possessed the land referred to in the plaint by virtue of Crown Grant No. 12524 of 18th December, 1899, but he denied that Sinnathangam was the wife of Sinnathamby. He also denied that Kathiramalai Annammai was her only sister and sole heir. He maintained that the deed of gift did not have the effect of conveying the ownership of the land as it was executed before Sinnathamby received the Crown Grant. The defendant claimed that by deed No. 13388, dated 15th July, 1950 (D 2) attested by P. V. Kandiah,

Notary Public, he purchased the land from the persons to whom the land came by inheritance on the death of Sinnathamby. The defendant has duly registered that deed and he claims that that deed prevails over all other deeds by virtue of prior and proper registration. He also claims that he was entitled to a decree by virtue of section 3 of the Prescription Ordinance. Admittedly the defendant is in possession and has cleared the jungle, fenced the land and planted it with coconut trees.

On the date of the trial it was conceded by the plaintiff that the land in dispute was cleared by and whatever improvements effected thereon had been effected by the defendant ; and that in the event of the plaintiff succeeding, the defendant would be entitled to compensation in regard to such clearing up of the land and the improvements thereto. It was agreed, of consent, that the amount of compensation payable by the plaintiff to the defendant in respect of such improvements would be decided upon by Mr. Tissaverasinghe (Surveyor), the Commissioner appointed by Court.

Learned counsel for the appellant submitted that the judgment of the learned District Judge was wrong on the following grounds :—

(*a*) The donation was made at a time when Sinnathamby was not the owner.

(*b*) It is not established that Annammai was the sole heir of Sinnathangam.

(*c*) The defendant being admittedly in possession of the land, the plaintiff has failed to discharge the burden imposed on him by section 110 of the Evidence Ordinance.

Learned counsel submitted that Sinnathamby had not received the Crown Grant at the time he executed the deed of gift, and that Sinnathangam did not become the owner of the land on the issue of the Crown Grant to Sinnathamby. Learned counsel for the respondent relying on the cases of *Gunatilleke* v. *Fernando*, (1921) 22 N.L.R. 385 (P.C.) and *Tissera* v. *William*, (1944) 45 N.L.R. 358, maintained that on the issue of the Crown Grant the ownership vested in Sinnathangam. The former case deals with the sale of land by a person who is not the owner and not with the case of a donation by such a person. The latter case deals with a donee who is in possession of property gifted to him by a donor who is not the owner of it. In the course of his judgment Keuneman, J., observed :

> " Certainly no authority has been cited to me to show that this exception (*exceptio rei venditae et traditae*) applies to the case of a donation, nor am I satisfied that a donation of this kind can be regarded as a sale."

But on the authority of a citation from Perezius on Donations, Book VIII, Tit. LIV, Ch. 14, he held that the *exceptio doli mali* was available even in the case of donations. As against that are the following observations of Clarence, J., in the case of *Don Mathes* v. *Punchi Hamy*, (Wendt's Reports, p. 122) :—

> " But the conveyance being merely a voluntary one, we are disposed to think that Siman's subsequently acquired title cannot be availed of by plaintiff, and that the plaintiff must take the subject-matter of the gift as it stood at the date of his conveyance."

In the quotation cited by Keuneman, J., Perezius does not say that the property of another can be donated. He says—

> " Nor can the property of another be effectually gifted inasmuch as it can be recovered and the ownership, therefore, is not acquired by him to whom the gift was made."

and then he proceeds to state a special case in which the *exceptio doli mali* would lie in the following words :—

> " Moreover the title given by the gift of another's property is useful in affording an opportunity of acquiring by *usucapio*, concerning which see 1, 2 and 3 ff. *Pro donato*. *The gift alone, however, has not this effect* but the continued possession through him to whom the gift was made together with *bona fides* which has the effect of adding the ownership through the negligence of the true owner."

Grotius also takes the view that another's property may not be donated. This is what he says according to Maasdorp's translation—

> " 1. Donation or gift is a promise whereby a person, without being bound to another, out of liberality binds himself to give that other something belonging to himself without receiving

anything from him in return or stipulating for anything for his own benefit."

After explaining what he means by "without being bound" he goes on to say—

"5. We say *belonging to himself*, for although the sale of another's property may be valid, as will be shewn hereafter, the same rule has not been sanctioned by the law with respect to donations, and consequently the donor is not bound to warrant the property given."—(*Maasdorp's Grotius*, p. 203-204).

Schorer's note on this topic is—

"For the rest it must be observed that warranty against eviction is due also in other contracts based upon valuable consideration, but not on those which are gratuitous (*causae lucrativae*), such as donation, for a donor is not liable for eviction unless he has acted fraudulently or has given an express warranty against eviction." (*ibid.*, p. 596).

Van Leeuwen expresses the same view—

"All things can be the subjects of gifts which are matters of trade, and can be subjected to our ownership, both corporeal and incorporeal." (Van Leeuwen—Barber's translation, p. 89).

The Latin is more expressive—

"*Donari non potest, nisi quod ejus fit, cui donatur.*"

Voet, too, states that donations can be given of one's own property only—

"All things may be deemed which are the subjects of commercial dealing, and which thus can be sold, hypothecated and bequeathed. This means one's own things, but not also those of others so as to have the effect that ownership should be at once transferred by donation to the receiver, unless the owner should agree. What was written by Pomponius, that 'nothing can be donated except what becomes the property of him to whom it is donated' must be understood in that sense."—(Voet, Bk. XXXIX, Tit. 5, sec. 10—Gane, Vol. 6, p. 93).

The authorities are all against the plaintiff-respondent and his claim, that Sinnathangam became the owner on the issue of the Crown Grant, is not entitled to succeed.

Now as to the second ground there is no evidence that Annamai was the sole heir of Sinnathangam. In cross-examination the plaintiff stated: "I do not know about Sinnathamby or his family. I bought this land for Rs. 100/-". The plaintiff and the vendor are strangers and he is unable to establish that his vendor was the legal owner. He called as his witness the Village Headman of Ninthavoor who stated that he knew the land referred to, that the defendant was in possession of it, that he had fenced it and planted with coconuts, and that he had done so for the previous eight years. The defendant gave evidence of the devolution of this land to him as narrated in his answer, but it would appear that even his evidence is hearsay and does not satisfy the requirements of section 32 of the Evidence Ordinance. Section 32 (5) reads—

"When the statement relates to the existence of any relationship by blood, marriage, or adoption between persons as to those relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised."

There is nothing to show that the defendant had special means of knowledge of the relationships he deposed to. In regard to the third ground of learned counsel for the appellant, section 110 of the Evidence Ordinance reads—

"When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."

Admittedly the defendant is and has been in possession of the land in dispute for the last eight years, and under section 110 of the Evidence Ordinance the burden is on the plaintiff to prove that the defendant is not the owner. The plaintiff has not succeeded in doing so. The plaintiff in his evidence says nothing about Sinnathangam or her family. Therefore, the statement in the plaint that Kathiramalai Sinnathangam died intestate leaving property to the value of Rs. 1,000/- and leaving behind her only sister, Kathiramalai Annammai, as the sole heir is not established. The failure to establish that fact is

fatal to his case. It is claimed that he purchased this land from the person who was the owner, which, too, he has failed to establish. In our opinion the appellant is entitled to succeed. We, therefore, allow the appeal and dismiss the plaintiff's action.

We declare that the appellant is entitled to the costs both here and below.

ABEYESUNDERE, J.
I agree.

Appeal allowed.

Present : **Herat, J.**

FERNANDO *vs.* COORAY

S.C. 21/61—*C.R. Colombo, A.* 1481/74430.

Argued and decided on : 14th June, 1962.

Compensation for improvements—Owner of land permitting another to enter it and erect buildings thereon—Such builder's right to compensation and to a jus retentionis until payment of compensation—Whether action for ejectment or damages maintainable until compensation is tendered.?

Held : (1) That where the owner of a land, without protest and being fully aware, allows another to enter that land and improve it by erecting a building, such builder is entitled to adequate compensation for the building erected and also to a *jus retentionis* in respect of the property improved until compensation is paid.

(2) That no claim for ejectment or damages can be successfully maintained against such a builder until the compensation due is duly assessed and tendered to him.

Cases referred to : *Hassanally* v. *Cassim*, 61 N.L.R. 529 ; LVII C.L.W. 100 ; (1960) 2 W.L.R. 607 ; 1960 A.C. 592 ; (1960) 2 A.E.R. 11
Rubin v. *Botha*, (1911) A.D. 568.

C. D. S. Siriwardena, for the defendants-appellants.

No appearance for the plaintiff-respondent.

HERAT, J.

In this case the plaintiff, one Somapala Cooray, sued the three defendants-appellants for damages in respect of wrongful possession of land and building and for ejectment therefrom. The action was a representative action where the three defendants-appellants had been appointed under section 16 of the Civil Procedure Code to represent an unincorporated society known as Sri Punyawardhana Samitiya of Rajagiriya. The three defendants-appellants were office-bearers in the said society. The facts as found by the learned Commissioner of Requests are as follows :— The plaintiff-respondent's father, one M. H. C. Cooray, (hereinafter referred to as Cooray, Senior), was a member of the abovementioned society sometime ago. The said society was formed to run a Dhamma school. It appears that the land and premises on which the society ran that school originally, for various reasons became unavailable to the society. The society was at a loss as to where it should conduct its activities. Thereupon Cooray, Snr., came to the society's rescue and permitted the said society to build a structure for the purpose of conducting its activities upon the land claimed in this action which undoubtedly belonged to him.

Subscriptions were collected from members of the public by the society and as the learned Commissioner finds, a substantial building was erected on the land in question with the leave and licence of Cooray, Snr. No protests of any kind or conditions were laid down by Cooray, Snr., as regards the erection of the said building. After the said building had come into existence and the Dhamma school was conducted therein further activities of an educational nature were conducted by the society on week days.

Cooray, Snr., died in 1955, but shortly before his death he executed a deed of gift including the land on which the said building stands, in favour of his son, Somapala Cooray, the plaintiff-respondent. The plaintiff-respondent states that

he duly notified the society to quit and deliver quiet possession of the land and premises in question to him but that the society has failed to do so. He thereafter brought the present action claiming damages for wrongful possession and for ejectment from the said building. The defendants-appellants on behalf of the society as an alternative claim stated that the building was worth about Rs. 1,000/- and claimed compensation. Although the claim of Rs. 1,000/- was beyond the jurisdiction of the Court of Requests and judgment cannot be given to the defendants-appellants in that sum, in any event it was within their rights to raise such claim for compensation in order to meet the claim of the plaintiff-respondent for ejectment and damages.

As Cooray, Snr., voluntarily allowed the building to be erected without protest and it was so erected with his leave and licence as the Commissioner finds the question arises as to what the position of the society is. It is now clear law that if a person who is the owner of a land without protest and being fully aware allows another to enter that land and improve it by erecting a building he cannot seek ejectment of the builder from the building and the land unless the builder is given adequate compensation for the building erected. The development of the modern Roman-Dutch Law has tended to put such a builder in the shoes of a bona fide improver and to give him not merely the right to claim compensation for improvements but also to claim a *jus retentionis* in respect of the property improved until compensation is paid. This principle is indicated in the judgment of Lord Villiers, Chief Justice, in the case of *Rubin* v. *Botha*, (1911) Appellate Division, p. 568, and in the more recent judgment of the Privy Council in the case of *Hassanally* v. *Cassim*, 61 New Law Reports, p. 529, where the opinion of the Judicial Committee was delivered by Viscount Simonds. Therefore, applying the principles of law stated above the society in this particular case had a right to claim compensation for the value of the building erected on the said land in suit and also to remain in possession thereof as well as the land appertaining to the building until compensation was paid in view of the *jus retentionis* given to it by the law. It is admitted that the plaintiff-respondent has not tendered any compensation or made any offer of compensation to the society. It cannot, therefore, be said that the society is in wrongful possession of the building and its adjuncts so that no claim for damages can be successfully maintained against the society. For the same reasoning the claim for ejectment must also fail because until compensation is duly assessed and tendered to the society the society has a right to remain in possession in view of the *jus retentionis* referred to above.

I, therefore, set aside the decree of the Court of Requests. I allow the appeal and dismiss the plaintiff-respondent's action.

The appellants will be entitled to costs of this appeal and also to costs in the Court of first instance.

Appeal allowed.

Privy Council Appeal, No. 17 *of* 1962.

Present : **Lord Jenkins, Lord Guest and Sir Kenneth Gresson.**

ZAINAB BINT ABDULLA GULAB AND ANOTHER

vs.

KULSUM BINT ABDUL KHALEQ AND ANOTHER

From

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

DELIVERED THE 2ND OCTOBER, 1963.

Mohammedan Law—Gift of a house made " inter vivos "—Donor and donee residing in the house at the time of gift—Whether transfer of possession necessary to complete the gift.

Deed—In form a sale but in fact a donation—Intention of parties to the deed to determine whether the transaction was a sale or a gift

One Ismail Abdulla Gulab owned a house in Aden in which he lived with his wife. Gulab and his wife brought up from childhood a sister of the wife, one Kulsum Bint Abdul Khaleq. Kulsum lived with Gulab and his wife in this house. The personal law of the parties was the Mohammedan Law. On the 19th August, 1957, Gulab executed a document in the form of a deed of sale which recited that Kulsum had agreed to buy the house for 25,000 Aden shillings. It also recited that Gulab as seller received this sum and transferred the land to Kulsum as buyer. The deed further recited that " the seller hereby gives possession of the aforesaid property to the buyer ". Gulab died on 10th August, 1959.

The appellants, who were heirs according to Mohammedan Law, of Gulab, sought a declaration that the conveyance of the 19th August, 1957, was void and should be delivered up for cancellation and that the property be declared to be part of Gulab's estate. This was based on an allegation that the transfer was " a sham and bogus transfer ", that it was, in fact a donation by Gulab to Kulsum, and that as possession had not been given by the donor to the donee, the donation was not valid in law. The appellants also contended that the deed of sale could not be treated as a deed of gift because the document recited a consideration.

It was found as a fact that no financial consideration had passed from Kulsum to Gulab, and that the alleged price was much below the normal value of the house.

Held : (1) That notwithstanding that the deed purported to be a sale and that the consideration was recited, it was, on the evidence, a gift and not a sale, the question being regarded purely as one of intention ; that the fact that the sum mentioned as consideration was far short of the actual value of the property and the fact that it was not paid at all went to show that the transaction was not a sale, but a gift with an imaginary consideration inserted " *in a manner common in such transactions in India* ".

(2) That, in the case of a donation, where both the donor and the donee reside in the same house at the time of the gift, no departure from the property by the donor is necessary in order to give possession to the donee ; that it was sufficient that an intention on the part of the donor to transfer possession should have been unequivocally manifested.

Followed : *Mohammad Abdul Ghani* v. *Fakhr Jahan Begam*, (1922) 49 I.A. 195.
Humera Bibi v. *Najm-Un-Nissa Bibi*, (1905) I.L.R. 28 All. 147 ; 2 A.L.J. 778 ; 12 Indian Decisions (New Series) 98.
Ex parte Fletcher, (1877) Ch. D. 809.
Ismail Mussajee Mookerdum v. *Hafiz Boo*, (1906) 10 C.W.N. 570 (P.C.) ; I.L.R. 33 Cal. 773 ; 33 I.A. 86 ; 3 A.L.J. 353

John A. Baker with *N. Hussain* for the appellants.

J. G. Le Quesne, Q.C. for the respondents.

SIR KENNETH GRESSON

This was an appeal from the judgment of the Court of Appeal of Eastern Africa dismissing an appeal against a judgment of the Supreme Court of Aden, which had dismissed an action brought by the appellants, who were plaintiffs in that action. The plaintiffs (as they will be called hereinafter) were heirs according to Mohammedan Law, of one, Ismail Gulab, who in his life-time, owned a house property in Aden, On 19th August, 1957, Gulab executed a document in the form of a Deed of Sale which after reciting that Kulsum Bint Abdul Khaleq, an Indian lady, a Moslem aged 42 years, had agreed to buy the property for 25,000 shillings, witnessed that in consideration of such payment, the receipt of which was acknowledged, Gulab (also a Moslem) as seller transferred the land in terms usual in such conveyances of land, and including the words, " The Seller hereby gives possession of the aforesaid property to the Buyer ". Kulsum, a sister of Gulab's wife, had been brought up from childhood by Gulab and his wife and had lived with them for about 25 years. The deed was duly registered in conformity with statutory provisions. After the execution of the deed, Kulsum continued to live in the house as before. Gulab died on the 10th August, 1959, then about 74 years old.

The plaintiff in the action sought a declaration that the conveyance of the 19th August, 1957, was void and should be delivered up for cancellation ; and that the property be declared to be part of Gulab's estate. This was based upon two allegations, the first, that Gulab, at the time of the transfer, was aged 72 years and had been for three years, infirm in mind and body, secondly, that the transfer was " a sham and bogus transfer " which was in the main based upon a submission that possession had not effectively been given by the donor to the donee. It is well settled that for a gift *inter vivos* to be valid under Mohammedan Law, three conditions are necessary :—(*a*) manifestation of the wish to give on the part of the donor ; (*b*) acceptance by the donee, either

impliedly or expressly ; and (*c*) the taking of possession of the subject-matter of the gift by the donee, either actually or constructively. (*Mohammed Abdul Ghani and Another* v. *Fakhr Jahan Begam and Others*, (1922) 49 I.A. 195, at p. 209).

It was common ground that the personal law of the parties was the Mohammedan Law. The relevant statute of Aden, provided that nothing therein should be deemed to exclude the rules of Mohammedan Law.

In the Supreme Court of Aden, there were findings of fact that the evidence had not warranted any conclusion, that Ismail had been induced to make the transfer by undue influence ; that no financial consideration had passed between Kulsum and Gulab ; and that there was nothing to warrant a finding that the transfer was made with intent to deprive the heirs of Ismail, of their inheritance.

These findings of fact were not challenged before the Board, but it was contended by counsel for the appellant that the transaction was not made as a gift by Ismail Gulab, during his life-time, but was obtained during the infirmity of the deceased, with the intent of depriving the legal heirs of the deceased, of their rightful shares in the estate of the deceased. There was, too, a further allegation of some relevance, that the deceased had intended to transfer the property by way of gift to Kulsum, but being advised that such a transfer might be challenged as being without consideration and intended to defeat the rights of the rightful heirs, had made an ostensible sale, wherein no consideration had passed from the buyer to the seller. It was further alleged (and apparently established) that the alleged price was much below the normal value of the property. The defendant pleaded by way of defence, that the first named defendant, Kulsum, was the absolute owner of the property ; denied that the transfer was without consideration and denied that the deceased wanted to transfer the property by way of gift. There are many decisions which have recognised that no departure from the property by the donor is necessary, where it has been established that both the donor and donee were residing in the house at the time of the gift, and the registration of a deed has been regarded as showing an unequivocal declaration on the part of the donor to give the property. Such a case was *Humera Bibi* v. *Najm-un-nissa Bibi*, (1905) 28 All 147, in which the fact that the donor continued to reside in the home of her nephew, was held to be of no effect in the face of the established manifestation of the intention of the donor to transfer the property to the nephew as donee. The donor in that case was a childless widow, who had brought up her brother's son as her own son. In every case, the intention of the donor is to be looked to and each case will depend on its own facts.

Counsel for the appellants contended strongly that there had been no such absolute relinquishment by the donor of the possession of the subject-matter of the gift as to constitute a gift under Mohammedan Law. Their Lordships are unable to uphold this contention, for in their opinion it was not necessary in order to perfect the gift that the donor should have vacated the house and removed his goods and chattels, even for a time. Where as in this case, the parties were living together, it is sufficient that an intention on the part of the donor to transfer possession, should have been unequivocally manifested. An appropriate intention where two are present on the same property may put the one out of, as well as the other into, possession, without any actual physical departure or formal entry, and effect is to be given as far as possible to the purpose of an owner whose intention to transfer, has been unequivocally manifested. (*Ex parte Fletcher*, (1877) Ch. D. 809).

It was also contended for the appellants, that the Deed of Sale could not be treated as a Deed of Gift, because the document recited a consideration—and, indeed, the defendant had denied that there had been any gift, and alleged that there had been a Sale. But in the case of *Ismail Mussajee Mookerdum* v. *Hafiz Boo*, (1906) C.W.N. 570, notwithstanding that the transaction in issue in that case purported to be a sale and the price was mentioned in the conveyance, it was held by the Board, on the evidence, to be a gift and not a sale, the question being regarded purely as one of intention. Sir Arthur Wilson, in that case said (at page 580) the fact that the sum of Rs. 10,000/- was mentioned as the price, a sum which according to the evidence, was far short of the actual value of the property, and the fact that it was not paid at all, went to show that the transaction was not a sale, but a gift with an imaginary consideration inserted " in a manner common in such transactions in India ".

Their Lordships are, therefore, of opinion that the judgment of the Court of Appeal for Eastern Africa, was right and will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs of the appeal.

Appeal dismissed.

Present : **Sansoni, J.**

L. C. H. PEIRIS *vs.* THE COMMISSIONER OF INLAND REVENUE

S.C. No. 596/'63—*M.C. Kalutara, Case* 47649 *with Application, No.* 390/'63.

Argued on : November 29, 1963.
Decided on : December 9, 1963.

Income Tax Ordinance, sections 64 (2) (*a*), 64 (2) (*b*), 65, 68 (1), *and* 80—*Appellant's returns for three consecutive years accepted and assessed—Thereafter additional assessments made in respect of same three years, purporting to act under a wrong section—Does this invalidate a certificate issued to a Magistrate under section* 80 ?—*Failure on the part of the appellant to appeal against such assessments—Has the Magistrate jurisdiction to hear and determine appellant's objections on the basis that the Assistant Commissioner's assessment was not legal* ?

On a certificate issued by the Assistant Commissioner of Inland Revenue under section 80 (1) of the Income Tax Ordinance to the Magistrate, summons was issued on the appellant to show cause why a sum of Rs. 254,745/- being income tax due from him and referred to in the certificate should not be paid.

After inquiry, the appellant was fined the amount of the tax under section 85 and in default he was ordered to undergo six months' simple imprisonment. Thereafter he appealed and filed an application in revision.

It transpired at the inquiry that the appellant had been orginally assessed in respect of three consecutive years. The dispute was whether the three additional assessments made and served on the appellant in respect of the same three years, by the Assistant Commissioner purporting to act under section 64 (2) (*b*) were legal or not.

Held : (1) That the Assistant Commissioner was wrong when he purported to act under section 64 (2) (*b*) for he had accepted the return and made an assessment in terms of section 64 (2) (*a*). The correct procedure would have been for him to act under section 65 and make an additional assessment on the basis that the former assessment was less than the proper amount.

(2) That the certificate issued under section 80 is not invalidated by this mistake inasmuch as : (*a*) the error was made by the Assistant Commissioner while exercising a jurisdiction vested in him ; (*b*) such an error is covered by section 68 (1) of the Ordinance ; (*c*) if the appellant was dissatisfied with the assessment made, he should have sought his redress by way of appeal.

(3) That the objection put forward by the appellant is not one which the Magistrate had jurisdiction to hear and determine.

Cases referred to : *Mohamed Dastagiar Sahib* v. *Third Additional Income Tax Officer*, (1961) 74 L.W. 540.
Deputy Fiscal v. *Tikiri Banda*, (1928) 29 N.L.R. 443.

N. E. Weerasooria, Q.C., with *N. E. Weerasooria* (*Jnr.*), for the accused-appellant.

V. C. Gunatilaka, Crown Counsel, for the respondent.

SANSONI, J.

The Assistant Commissioner of Inland Revenue, acting under section 80 (1) of the Income Tax Ordinance, Cap. 188, issued a certificate to the Magistrate certifying that the appellant (who has also applied in revision) had made default in the payment of Rs. 254,745/- being income tax due from him. Summons was issued on the defaulter who showed cause against the tax being recovered

After inquiry, the appellant was fined the amount of the tax under section 85 ; in default he was ordered to undergo a term of six months' simple imprisonment. He has appealed and filed an application in revision.

It transpired in the course of the inquiry that the appellant had originally been assessed in respect of three consecutive years, and the dispute was whether the three additional assessments made and served on the appellant in respect of those three years were legal or not. In making those additional assessments the Assistant Commissioner in each case purported to act in terms of section 64 (2) (*b*), Cap. 188, which enables an

*For Sinhala translation, see Sinhala section, Vol. 7 part 5, p. 18

assessor, if he does not accept a return of income furnished by a person, to estimate the amount of the assessable income of such person and assess him accordingly. The Assistant Commissioner was wrong when he purported to act under section 64 (2) (*b*), for he had accepted the return and made an assessment in terms of section 64 (2) (*a*). The correct procedure would have been for him to act under section 65 and make an additional assessment on the basis that the former assessment was less than the proper amount.

The learned Magistrate thought that section 65 did not apply and that the assessor could have acted under section 64 (2) in the circumstances of this case. With respect I am unable to agree. But it still remains to be considered whether the certificate issued under section 80 (1) is invalidated by the mistake which the Assistant Commissioner made. In my opinion it is not. It is well-settled that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle has been applied even to cases where a Statute which confers no power has been quoted as authority for a particular act, and there was in force another Statute which conferred that power. See *Mohamed Dastagiar Sahib* v. *Third Additional Income Tax Officer*, (1961) 74 L.W. 540. Further, section 68 (1) of the Ordinance provides that " no notice, assessment, certificate, or other proceeding purporting to be in accordance with the provisions of this Ordinance shall be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of this Ordinance . . . ". The error made by the Assistant Commissioner is covered by this provision.

There is another reason why it was not open to the defaulter in this case to raise the objection he did. The Act sets up a particular machinery for the making of an assessment and the questioning of an assessment when it has been made. An assessee who is dissatisfied with an assessment must seek his redress by way of appeal before the authorities set up by the Act. If the Assistant Commissioner makes a mistake of law in quoting the wrong section in support of the additional assessments, and the assessee feels that he can object to the assessments on that ground, his only course is to appeal. I would only add that although the Assistant Commissioner made an error while exercising a jurisdiction vested in him, his acts cannot be said to have been without jurisdiction.

The Magistrate exercising jurisdiction under section 80 is acting like a Court executing a judgment. The particular objection which the assessee put forward is not one which could properly be raised at that stage, and it is not one which the Magistrate had jurisdiction to hear and decide. There are certain objections which an assessee can raise before the Magistrate, as has been pointed out in several decisions of this Court, but this is not one of them.

Mr. Weerasooria relied on the case of *Deputy Fiscal* v. *Tikiri Banda*, (1928) 29 N.L.R. 443, in which it was held that a warrant issued for the arrest of a judgment-debtor was void because it was not signed by the Judge. There is no resemblance between that case and this one. That judgment certainly does not lend support to the argument that the Magistrate has no jurisdiction in this case, or that the additional assessments are void because they purported to have been made under the wrong section of the Act.

I reject the appeal, for no appeal lay in this case, and I dismiss the application in revision.

Appeal rejected.
Application dismissed.

Present : **Basnayake, C.J., Abeyesundere, J., and G. P. A. Silva, J.**

A. E. REID *vs.* THE ATTORNEY-GENERAL

S.C. No. 15/1962—*D.C.* (*Criminal*) *Colombo, No. N.* 2090.

Argued on : February 1, 1963.
Decided on : July 11, 1963.

Penal Code, section 362 B—Bigamy, conviction for—Marriage under the Marriage Registration Ordinance—While such marriage subsisting man embracing Islam and marrying under Muslim Marriage

and Divorce Act a woman who has also embraced Islam—Is he guilty of bigamy ?—Marriage Registration Ordinance, sections 18 *and* 64.

Held : That a man who has contracted a marriage under the Marriage Registration Ordinance is not guilty of bigamy when, while his marriage is subsisting, he embraces Islam and marries under the Muslim Marriage and Divorce Act, a woman who has also embraced Islam.

C. S. Barr-Kumarakulasinghe with *S. Kanagaratnam* and *C. W. Perera*, for the accused-appellant.

Vincent T. Thamotheram, Deputy Solicitor-General, with *G. P. S. de Silva, Crown Counsel*, for the complainant-respondent.

BASNAYAKE, C.J.

The question for decision on this appeal is whether a man who has contracted a marriage under the Marriage Registration Ordinance commits bigamy if, while his marriage is subsisting, he embraces Islam and marries under the Muslim Marriage and Divorce Act a woman who has also embraced Islam.

Briefly the facts are as follows :—The appellant Allen Ellington Reid *alias* Ibrahim Reid, was convicted of bigamy, an offence punishable under section 362 B of the Penal Code, in that, while his lawful wife, Edna Margaret Fredrica De Witt, was living, he married Fatima Pansy. He has been sentenced to undergo a term of three months' rigorous imprisonment.

The appellant who was a Roman Catholic married at St. Mary's Church, Badulla, on 18th September, 1933, Edna Margaret Fredrica Reid *nee* De Witt. They had eight children of whom six died. While that marriage was subsisting the appellant on 16th July, 1959, married Fatima Pansy Von Haght at the Muslim Registrar's Office, at No. 2/6, Saunders Court, Colombo. Her maiden name was Pansy Mary Clair Von Haght and she first married Vincent de Kauwe who divorced her on 7th November, 1958. At the time of his second marriage the appellant and his second wife had become persons professing Islam. They had been converted by the Muslim priest at the Vekanda Mosque on 13th June, 1959. On their conversion the appellant was named Ibrahim and his second wife Fatima. The appellant gave evidence admitting the above facts. Section 362 B of the Penal Code with the breach of which the appellant has been indicted and found guilty reads—

> " Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

In the instant case the appellant had a wife living. Therefore, the first element of the penal provision is satisfied. The second element is also satisfied because he contracted a second marriage. The third element is that the second marriage should be void by reason of its taking place during the life of the first husband or wife. Is the third element satisfied ? Learned Deputy Solicitor-General maintained that section 18 of the Marriage Registration Ordinance applied and that until the appellant divorced his wife or she died he was not free to contract a valid marriage as his first marriage was registered under that Ordinance. The section on which he relies reads—

> " No marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void."

The section declares that no " marriage " shall be valid where there is a prior " subsisting marriage ". Now what is a marriage for the purpose of section 18. That expression is defined in section 64 and it means—" any marriage, save and except marriages contracted under and by virtue of the Kandyan Marriage Ordinance, 1870 or the Kandyan Marriage and Divorce Act, and except marriages contracted between persons professing Islam ". There is nothing in the context of section 18 which renders the definition inapplicable. That section has, therefore, no application to marriages contracted under the Kandyan Marriage Ordinance, 1870, the Kandyan Marriage and Divorce Act, and marriages " contracted between persons professing Islam ". Although Kandyan marriages are excluded from the definition and, therefore, from the ambit of section 18, a Kandyan is not free to marry a second time while the first marriage is subsisting as section 6 of the Kandyan Marriage and Divorce Act

declares invalid a second marriage under the Act where the spouse of the previous marriage is alive and the marriage is subsisting. Now the appellant's second marriage was registered under the Muslim Marriage and Divorce Act. Although that Act is not specially mentioned in the definition, marriages contracted by persons professing Islam are excepted. Persons professing Islam can now marry only under the Muslim Marriage and Divorce Act. So that marriages under that Act are not marriages within the definition of the expression " marriage " in the Marriage Registration Ordinance.

In the instant case Ameer, the Muslim Priest at Vekanda Mosque, has testified to the fact that he converted to Islam both the appellant and his second wife on 13th June, 1959, and that on 16th July, 1959, he registered their marriage which according to the notice given to the Quazi of the area under the Muslim Marriage and Divorce Act was a Notice of Intention to contract a second or subsequent marriage. The proximity of the date of the second marriage to the date of conversion gives room for the suspicion that the change of faith was with a view to overcoming the provisions of section 18 of the Marriage Registration Ordinance. But that circumstance does not affect the validity of the second marriage.

The evidence of the Quazi and the priest who registered the marriage indicates that the requirements of the Act as to registration of the marriage have been observed and that they were satisfied that the parties were persons professing Islam.

The appellant is, therefore, not guilty of bigamy. We quash the conviction and sentence, and acquit him.

ABEYESUNDERE, J.
I agree.

G. P. A. SILVA, J.
I agree.

Appeal allowed.

Present : **T. S. Fernando, J.**

MUHAMMAD ABDULLA SITHI MAFTHOOHA
vs.
ABDUS SAMAD MUHAMMAD THASSIM & OTHERS

S.C. Application, No. 373 *of* 1962.

In the matter of an Application under section 45 *of the Courts Ordinance* (*Cap.* 6) *for a Mandate in the nature of a Writ of Habeas Corpus directed to Abdus Samad Muhammad Thassim to produce the bodies of Muhammad Thassim Fathima Lareefa* (*minor*) *and Muhammad Thassim Zeenathul Areefa* (*minor*).

Argued on : 11th June, 1963.
Decided on : 18th June, 1963.

Muslim Law—Shafei sect—Custody of minor female children—When is right to custody lost—Best interests of child—Mother " Unworthy of being trusted ".

The petitioner applied to Court for an order directing her husband, the first respondent, from whom she had separated, to hand over to her the custody of her two minor female children.

Both parties were governed by the law applicable to the Shafei sect of Muslims.

Counsel for the first respondent argued that the application must fail since the best interests of the child was the paramount consideration. He submitted that the evidence indicated that the petitioner was a weak-willed woman, completely under the domination of her elder sister, and therefore, " unworthy of being trusted ".

Held : (i) That though there is no doubt that the Court is called upon to adjudicate in the best interests of the child, such adjudication must be reached within the framework of the law governing the parties.

(ii) That under the law applicable to the Shafei sect of Muslims, any disqualification on the ground of being " unworthy of being trusted " must arise out of misconduct.

Per T. S. FERNANDO, J. :—" Under the law applicable to the Shafei sect of Muslims, the mother is ordinarily entitled to the custody of her female children. That right to custody which is known as *hizanat* is lost—

(1) by the subsequent marriage of the *hazina* with a person not related to the child within the prohibited degrees ;
(2) by her misconduct ;
(3) by her changing her domicile so as to prevent the father or tutor from exercising the necessary supervision over the child ;
(4) by her abjuration of Islam ;
(5) by her neglect or cruelty to the child. "

Authorities referred to : *Mahommedan Law by Ameer Ali,* (5th Edition) pp. 256 & 257

S. A. Marikar with *M. D. K. Kulatunge*, for the petitioner.

H. W. Jayewardene, Q.C., with *M. S. M. Nazeem* and *M. T. M. Sivardeen*, for the 1st respondent.

T. S. FERNANDO, J.

The petitioner, the wife of the 1st respondent, makes this application for an order from this Court directing her husband to hand over to her custody the 2nd and 3rd respondents who are their children. The 2nd and 3rd respondents are both females, and are today of the ages of 4 and 2 years, respectively. The petitioner has left her marital home and says that the 1st respondent prevented her from taking these two children away with her.

There is no dispute between these parties who are Ceylon Moors that they are governed by the law applicable to the Shafei sect of Muslims. Under that law, the petitioner as the mother is ordinarily entitled to the custody of her female children. That right to custody which is known as *hizanat* is lost—

(1) by the subsequent marriage of the *hazina* with a person not related to the child within the prohibited degrees ;

(2) by her misconduct ;

(3) by her changing her domicile so as to prevent the father or tutor from exercising the necessary supervision over the child ;

(4) by her abjuration of Islam ;

(5) by her neglect or cruelty to the child—*vide* Mahommedan Law by Ameer Ali (5th edition), p. 256.

At the inquiry made on this application by the Magistrate of Matara the respondent failed to establish the existence of any one of the above five grounds. Mr. Jayewardene, stating that on an application for the custody of a child the paramount consideration is what is in the best interests of the child, argued that the authorities indicate that where the evidence shows that the mother is " unworthy of being trusted " she is not entitled to custody of the child. There is no doubt that the Court is called upon to adjudicate in the best interests of the child, but that adjudication must be reached within the framework of the law governing the parties. Under that law, as I apprehend it, it is not open to this Court to refuse a mother the custody of her infant female children unless she by her conduct has disqualified herself from claiming the right to such custody. The allegation that the petitioner is " unworthy of being trusted " is put forward on the basis that the evidence shows that she is a weak-willed woman, completely under the domination of her elder sister. But as Ameer Ali's treatise itself indicates—*vide* p. 257—any disqualification on the ground of being " unworthy of being trusted " must arise out of misconduct. Misconduct is not established on the evidence here, and even if it has been shown that the petitioner is a woman of weak will that infirmity has not led to misconduct or, I might add, even neglect such as is contemplated in the relevant law. That being so, the respondent has failed to show that the best interests of these two infant children require that the person who *prima facie* is entitled to their custody should be denied that right.

The application is allowed and I make order directing the 1st respondent to hand over the 2nd and 3rd respondents to the custody of the petitioner. This order will be executed by the Magistrate's Court of Matara.

Application allowed.

Present : **Basnayake, C.J., and Abeyesundere, J.**

DE SILVA *vs.* DE SILVA

S.C. No. 427-428/1960—*D.C. Matara, No.* 227/*D.*

Argued on : August 29 and 30, 1962.
Decided on : December 12, 1963.

Divorce—Constructive malicious desertion—When is it a ground for divorce ?—Order for permanent alimony—At what stage should it be made ?—Civil Procedure Code, section 615.

Held : (1) That where each party alleges that the other is the deserter, it is necessary to ascertain who is substantially responsible for the desertion in law. It does not matter which of the parties actually goes away from the matrimonial home. The party who really deserts is the one who compels the desertion.

(2) That the matter of permanent alimony should be considered only when the Court comes to enter decree absolute and not when ordering *decree nisi* for divorce.

Cases referred : *Crossley* v. *Crossley*, 1912 W.L.D. 49
Solomon v. *Solomon*, 1927 W.L.D. 330

H. W. Jayewardene, Q.C., with *D. R. P. Goonetillake* and *S. S. Basnayake*, for the plaintiff-respondent, in Appeal No. 427, and for the plaintiff-appellant in Appeal No. 428.

T. B. Dissanayake, for the defendant-appellant, in Appeal No. 427 and for the defendant-respondent, in Appeal No. 428.

BASNAYAKE, C.J.

This is an appeal from the judgment of the District Judge granting a divorce *a vinculo matrimonii* to the wife of the plaintiff on the ground of malicious desertion by him.

The plaintiff sought a divorce *a vinculo matrimonii* from the defendant on the ground of malicious desertion. The defendant also prayed a divorce *a vinculo matrimonii* on the ground of malicious desertion and asked for permanent alimony in Rs. 150/- per mensem.

It was stated in the plaint that the defendant and the plaintiff were married on 22nd April, 1957, and that on 4th June, 1957, the defendant left the house of the plaintiff while the plaintiff was away and took up residence in her parental home and refused to return though repeatedly requested to do so. In the answer the defendant stated that the plaintiff ill-treated her, and that he assaulted her and threw her out of the house. She also stated that the plaintiff by his conduct made it impossible for her to live in the matrimonial home and compelled her to quit it.

The main issue before the Court was whether the defendant or the plaintiff was guilty of malicious desertion.

On that issue there is a conflict between the testimony of the plaintiff and that of the defendant. The learned Judge has preferred the defendant's version to that of the plaintiff. He appears to have done so particularly because the defendant's version is supported by documentary evidence while the plaintiff's is not so supported. Although the plaintiff in the course of his evidence spoke of letters he had written to the defendant, he caused none to be produced. The letters written by the defendant to her mother D 1, D 3, D 5, when she was living with the plaintiff, and her complaint to the police D 6 all support her version that the plaintiff's conduct made it impossible for her to continue to live in the matrimonial home and compelled her to quit it.

The learned Judge's finding is expressed thus :

> " On a consideration of the evidence, I am satisfied that the plaintiff's cruelty as deposed to by the defendant was the real cause which compelled the defendant to leave the plaintiff so soon after the marriage."

We see no reason to disturb the learned District Judge's finding of fact.

Now the law applicable to the parties to the present action is the Roman-Dutch Law. Under that law malicious desertion is a ground for divorce.

Section 19 (2) of the Marriage Registration Ordinance provides that a judgment of divorce *a vinculo matrimonii* may be founded either on the ground of adultery subsequent to marriage, or of malicious desertion, or of incurable impotency at the time of such marriage. Now what is malicious desertion according to our law ? Brouwer whose definition of malicious desertion has been judicially adopted defines it thus—

> " *Malitiosus desertor est, qui nulla justa aut necessaria causa coactus, ex animi quadam levitate malitia, vel impatientia freni conjugalis uxoris & liberarum curam objicit, eos deserit & oberrat sine animo redeundi.*"

Where each party alleges that the other is the deserter, it is necessary to ascertain who is substantially responsible for the desertion in law. It does not matter which of the parties actually goes away from the matrimonial home. The party who really deserts is the one who compels the desertion. [*Crossley* v. *Crossley*, (1912) W.L.D. 49)]. The proposition was thus stated in *Solomon* v. *Solomon*, (1927) W.L.D., 330 at 334, " the person who prevents the continuance of the marital relations is in the same position as the person who himself refuses to continue those relations ".

In the instant case the plantiff it was that compelled the defendant to quit the matrimonial home. He repeatedly stated that he would take the defendant to her mother's home and leave her there. By his conduct he made it impossible for the defendant to live in the matrimonial home and finally he put her out of the house and closed the door.

The conclusion of the learned District Judge is well-founded both in law and fact. The appeal of the plaintiff is, therefore, dismissed with costs.

The learned Judge appears to have disposed of the claim for permanent alimony when ordering that decree *nisi* for divorce be entered. The decree in regard to permanent alimony appears to be premature. Section 615 of the Civil Procedure Code empowers the Court to make an order for permanent alimony only on a decree absolute declaring a marriage to be dissolved being entered against the husband. That stage has not yet been reached and the matter of permanent alimony should be considered when the Court comes to enter decree absolute. The defendant's appeal against the refusal to award permanent alimony is allowed and the order refusing permanent alimony is set aside *pro forma* to enable the Court to consider the matter at the proper time.

ABEYESUNDERE, J.

I agree.

Appeal No. 428 *dismissed.*
Appeal No. 427 *allowed.*

IN THE COURT OF CRIMINAL APPEAL

Present : **Basnayake, C.J. (President), Herat, J., and Abeyesundere, J.**

THE QUEEN *vs.* M. G. SUMANASENA

Appeal No. 74 *of* 1963 *with Application No.* 76 *of* 1963—*S.C. No.* 86/*M.C. Kegalle, No.* 41188.

Argued on : October 14 and 15, 1963.
Decided on : October 15, 1963.

Court of Criminal Appeal—Criminal trial before jury—Burden of proof—Cumulative effect of many suspicious circumstances proved against accused—Whether any burden cast on accused thereby—Misdirection.

In the trial of an accused for a criminal offence before a jury, the learned Judge directed the jury as follows:—

> " I told you that I agree with counsel for the defence that the accused is presumed to be innocent. It is for the prosecution to establish his guilt. The accused does not have to give evidence. He need not even call evidence, but at the same time I must tell you, if you are satisfied that there are many suspicious circumstances proved against the accused and those suspicious circumstances when taken together, that is taken cumualtively make up a sort of strong case against the accused and if you believe that if he is innocent of the offence it is in his power to offer a explanation of those suspicious circumstances and he refuses to explain those suspicious circumstances, it is a reasonable and justifiable conclusion that he is refraining from explaining those circumstances because those circumstances cannot be explained."

Held : (1) That the learned judge's direction was wrong and that suspicious circumstances did not establish guilt ; nor did they relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt, or compel the accused to give or call evidence.

(2) That as it could not be said that the Jury was not influenced by this passage, the conviction of the accused should be quashed.

Case referred to : *Rex* v. *Lord Cochrane and others*, (1814) Gurney's Rep. 479.

M. Kanakaratnam (*assigned*), for the accused appellant.

R. Abeysuriya, Crown Counsel, for the Attorney-General.

BASNAYAKE, C.J.

The only point that arises for decision in this case is whether the following direction of the learned Judge is wrong in law and if so whether it influenced the verdict—

> "I told you that I agree Counsel for the defence that the accused is presumed to be innocent. It is for the prosecution to establish his guilt. The accused does not have to give evidence. He need not even call evidence, but at the same time I must tell you, if you are satisfied that there are many suspicious circumstances proved against the accused and those suspicious circumstances when taken together, that is taken cumulatively, make up a sort of a strong case against the accused and if you believe that if he is innocent of the offence it is in his power to offer an explanation of those suspicious circumstances and he refuses to explain those suspicious circumstances, it is a reasonable and justifiable conclusion that he is refraining from explaining those circumstances because those circumstances cannot be innocently explained. I have tried to put in my own words what was said by a learned Judge a long time ago. This is what the Judge said, I will repeat it to you because I find you are taking a keen interest in what I am saying and you are taking notes of what I am saying. In effect there is no difference from what I have said. I will quote to you the words of the Judge : 'The accused has made no attempt to explain away these suspicious circumstances nor, indeed, was he bound to do so. Nevertheless, if he refused to do so where a strong *prima facie* case has been made out and when it is in his own power to offer evidence, if such exists, in explanation of such suspicious appearances (*sic*), which would show them to be fallacious and explicable consistently with his innocence, it is a reasonble and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest'."

In our opinion the learned Judge's direction is wrong. Suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence. We are unable to reconcile what the learned Judge said earlier in his summing-up with what he said in the passage to which exception is taken. The burden of establishing circumstances which not only establish the accused's guilt but are also inconsistent with his innocence remains on the prosecution throughout the trial and is the same in a case of circumstantial evidence as in a case of direct evidence. The words quoted by the learned Judge appear to us to be the words attributed to Lord Ellenborough in the case of *Rex* v. *Lord Cochrane and others*, (1814) Gurney's Rep., p. 479. The report of the trial in which he expressed those observations is not available in any of the libraries in Hulftsdorp and it is, therefore, not possible to ascertain the context in which it was stated. In view of the fact that this opinion was expressed by Lord Ellenborough in 1814 before the Criminal Evidence Act and at a time when an accused person had no right to give evidence on his own behalf, it is unthinkable that he thereby intended to impose on the accused a burden which the law did not permit him to discharge. It would appear from the fact that *Rex* v. *Cochrane and others* is not referred to in the recent editions of such authoritative text books on evidence as Taylor and Phipson that the dictum of Lord Ellenborough is no longer good law even in England. In our opinion the doctrine of Lord Ellenborough has no place in the scheme of our criminal law. What the learned Judge stated at the conclusion of his summing-up negatives the effect of what he correctly said earlier, and it would appear that the jury retired to their room carrying with them typescripts of the erroneous dictum of Lord Ellenborough.

We are unable to say that the verdict of the jury was not influenced by the passage in the summing-up which they had before them in writing at the time of their deliberations. The conviction must, therefore, be quashed. We have carefully considered the question whether we should direct that a judgment of acquittal be entered or order a new trial. Having regard to the facts on which the prosecution relied and to the fact that the offence was committed as far back as September, 1961, we do not think that this is a case in which we should put the accused in jeopardy once more.

We, therefore, quash the conviction and direct that a judgment of acquittal be entered in his favour.

Conviction quashed.

IN THE COURT OF CRIMINAL APPEAL

Present : **Basnayake, C.J. (President), Weerasooriya, S. P. J., and H. N. G. Fernando, J.**

THE QUEEN *vs.* JULIS AND OTHERS

Appeals Nos. 253 *to* 255 *of* 1961 *with Applications Nos.* 264 *to* 266 *of* 1961—*S.C. No.* 123, *M.C. Gampaha, No.* 51787/*A.*

Argued on : May 28, 29 and 30, 1962.
Decided on : November 18, 1963.

Court of Criminal Appeal—Charges of house-breaking, unlawful assembly, robbery and using violence against five persons—Whilst 1st witness under cross-examination, indictment against 1st accused withdrawn—Discharge of 1st accused—After evidence of other eye-witnesses another accused discharged on indictment against him being withdrawn—Trial continued against other accused after evidence of Police witnesses—Accused convicted—Appeal.

Identification, case against two accused convicted resting on—Identification parade held by Police Sergeant on orders of Magistrate—Whether valid—Failure on part of witnesses identifying to state the specific acts committed by accused, though pointed out—Presence of opportunities for accused being shown or particulars facilitating identification being given to witnesses—Withdrawal of indictment against some accused, amounting virtually to Crown conceding eye-witnesses to be unworthy of credit—Can evidence of these witnesses support conviction of other accused—Maxim "falsus in uno, falsus in omnibus"—Its applicability—Evidence Ordinance, sections 5, 45, 165, 155 *and* 157.

Trial by Judge and Jury—View of the scene of offence after defence closed—Witnesses examined on oath and details of places and objects referred to in their evidence in Court pointed out and answers given to questions regarding commission of offence and identification parade—Does this procedure vitiate conviction—Criminal Procedure Code, sections 231 *to* 238, 429.

The appellants, who were the 2nd, 4th and 5th accused, were jointly tried with two others—the 1st and the 3rd—on charges of : (*a*) being members of an unlawful assembly, the common object of which was to commit house-breaking and robbery ; (*b*) using violence in prosecution of the said common object ; (*c*) committing house-breaking and robbery in prosecution of the said common objects, offences punishable under sections 140, 144 and 443 and 380 read with section 146 of the Penal Code.

The occupants of the house in question on the day of the offence were four persons, viz., *T.*, *W.* (*T.*'s son), *M.* (*T.*'s mistress) and *S.*, their servant. After the evidence of *T.*, the 1st witness, who implicated among others the 1st, 4th and 5th accused, Crown Counsel applied to withdraw the indictment against the 1st accused, on the ground that the other evidence he had would not take the case against the 1st accused any further. This application was allowed and the 1st accused was discharged.

T., in his evidence also stated : (*a*) that the 5th accused, who was a stranger then and whom he identified later at a parade, went up with a knife upraised to stab *W.* ; (*b*) that he identified the 4th accused as one of the robbers at the parade. He assigned no specific act to the 4th accused.

W., being called, stated in examination-in-chief : (*a*) that among the robbers who entered the house were the 4th accused, who gave him a blow on the back of the left shoulder ; (*b*) that the 5th accused tried to stab him; (*c*) that he had not seen either of them before, but later identified them at a parade. In cross-examination he supported the evidence against the 1st accused.

S., giving evidence implicating the 2nd accused stated : (*a*) that he knew the 2nd accused for about four to five years ; *b*) that he told witness, Aron, all that the 2nd accused did that night (which was confirmed by the statement made by Aron to the Police).

After witness, Aron, gave evidence, Crown Counsel informed Court that the only other evidence he proposed to call was the evidence of certain Police Officers. At this stage there being no evidence against the 3rd accused and upon a direction by the trial Judge, the jury brought in a verdict of not guilty against the 3rd accused and he was acquitted.

The trial then proceeded against the 2nd, 4th and 5th accused and the further evidence led at the trial was as follows:—

(*a*) that the 4th and 5th accused were arrested by the Police ; (*b*) that their arrest was not in consequence of any information given by the inmates of the house ; (*c*) that an identification parade was held in the Magistrate's Court on 19.10.59, by Police Sergeant Edirisinghe, on the orders of the Magistrate; (*d*) that 4th and 5th accused were lined up in the parade along with twelve others ; (*e*) that Sergeant Edirisinghe requested *T.* and *W.* (witnesses) as each of them was brought into Court to point out the person or persons, who came on the night of the offence and committed robbery and used force on them and that each of them pointed out the 4th and 5th accused.

Evidence was also elicited by the defence in cross-examination in support of its suggestion that prior to the identification parade the two witnesses had either been shown the 4th and 5th accused, or been given such particulars relating to them as would have facilitated their identification at the parade.

Thus the case for the 4th and 5th accused rested entirely on the fact that they were identified at the parade by *T.* and *W.* and on the evidence testifying to that fact given at the trial by them and Sergeant Edirisinghe.

It was contended in appeal : (*a*) for the 4th and 5th accused that the verdict of the jury was unreasonable and could not be supported by the evidence for the reasons that : (i) the jury should not have acted on the evidence of *T.* and *W.* because when Crown Counsel moved to withdraw the indictment against the 1st accused, the Crown virtually conceded that these two witnesses were not worthy of credit in regard to their evidence implicating the 1st accused ; (ii) that the identification parade held as aforesaid was not properly conducted ; (iii) that the evidence of *T.* and *W.* at the trial testifying thereto was not satisfactory ; and (iv) that the evidence of Sergeant Edirisinghe was not admissible to corroborate the evidence of identification. (*b*) for the 2nd and 5th that the trial was vitiated by certain irregularities and illegalities connected with the inspection of the scene and other places by the jury in the presence of the Judge and Counsel after all the evidence led for the prosecution and the defence was concluded. These irregularities and illegalities consisted of questions to witnesses who pointed out details of places and objects referred to in their evidence in Court and answered on affirmation by Court, both with regard to the commission of the offence and the identification parade.

Held : (1) That inasmuch as in moving to withdraw the indictment against the 1st accused the Crown had virtually conceded that witnesses *T.* and *W.* were unworthy of credit in regard to their evidence implicating the 1st accused, their evidence against the other accused should not be accepted as true unless there is some compelling reason for doing so.

(2) That in this case the most that can be urged for accepting the evidence of the said two witnesses implicating the 4th and 5th accused is that each of them in turn picked out these two accused from among those lined up in the identification parade as two of the robbers ; but the evidence of Sergeant Edirisinghe to this effect, though relevant under section 9 of the Evidence Ordinance does not go very far in showing the truth of the evidence of these two witnesses, as neither of them was able to give the Police a description of the robbers, which tallied in any way with the 4th and 5th accused and as their evidence was contradictory as to what these two accused did at the scene of the robbery.

(3) That the evidence of Sergeant Edirisinghe was not admissible under section 157 of the Evidence Ordinance to corroborate the statement made by the two witnesses, *T.* and *W.* at the identification parade, inasmuch as he was not an " authority legally competent to investigate the fact " of the identity of the 4th and 5th accused as persons concerned in the commission of the offences within the meaning of that section. The sergeant held the identification parade on the orders of the Magistrate, who had no power to delegate his duties.

(4) That even if such statements were admissible under section 157 of the Evidence Ordinance, they were not corroboration in the true sense of the term, for corroboration must be extraneous to the witness who is to be corroborated.

(5) That consequently, the verdict of the jury in convicting the 4th and 5th accused on the evidence of witnesses *T.* and *W.* was unreasonable.

On the submission on behalf of the 2nd and 5th accused that the trial was vitiated by certain irregularities and illegalities connected with the inspection of the scene and other places as aforesaid, the majority of the Court, after considering the scope of section 238 of the Criminal Procedure Code and the decisions thereon—

Held : (Basnayake, C.J. dissenting)

(6) That there could be no legal objection to the jury having been shown the various places, objects and matters to which their attention was specially directed in the course of the inspection and which are set out in the judgment. The only irregularity of which any notice may be taken is that the questions put to the witnesses and the replies they gave took the form of evidence recorded at the inspection, instead of the witnesses being recalled in Court after the inspection and their evidence recorded as to what took place at the inspection.

(7) That this irregularity was not sufficient to vitiate the trial or to result in material prejudice to the 2nd accused, as most of the evidence recorded at the scene was in respect of matters which had already been deposed to by the witnesses concerned, when they gave evidence earlier in Court.

In view of the importance of the questions of law involved in this case His Lordship the Chief Justice delivered a separate judgment discussing in particular the question of the scene of offence being viewed by the jury—on which question he dissented from the majority of the Court. The facts and the law on this question as set out in his Lordship's judgment may be summarised as follows :—

After the case for the prosecution and the defence had been closed the Commissioner of Assize, the Jury, Counsel, the witnesses, the accused and the Court staff visited the house of witness *T.*, where the offences aforesaid were committed. There the learned Commissioner first examined on oath several witnesses including the aforesaid *T.*, *W.* and *S.*, and then recalled and questioned them at different places he visited on that occasion. The minutes of the transcript did not show where the jury were while the Commissioner was moving from place to place and whether they were in a body under the care of an officer of the Court, while the witnesses were being examined by the Commissioner at the different places. There was nothing to indicate that what was said by the witnesses examined by the Commissioner was heard by each and every-one of the jurors.

His Lordship after discussing such questions as : Does a view of the scene of offence form part of a trial ? Can a Judge test the veracity of witnesses by directing demonstrations, experiments and explanations of witnesses at the scene ? Legality of a Judge of the Supreme Court holding Criminal Sessions at a place other than a public place appointed for the purpose and the effect of sections 53 and 85 of the Courts Ordinance, section 429 of the Criminal Procedure Code and section 165 of the Evidence Ordinance, expressed his views as follows :—

(1) That the procedure adopted by the learned Commissioner was not authorised by section 238 of the Criminal Procedure Code. By examining witnesses and taking evidence, as if he were holding a sitting of the Court, he acted illegally.

(2) That the provision in section 238 (1) of the Criminal Procedure Code, that " the Judge shall make an order " that the Jury should view the scene of offence, contemplates a formal order by the Judge giving the reasons for it and not a bare minute or record. It is an imperative provision. So is the requirement therein to appoint an officer of the Court under whose care the Jury has to be conducted to view the scene.

(3) That a view ordered under section 238 is not a part of the trial for the reason that the persons whose attendance is essential to a trial such as the Judge, the accused and the respective counsel are not required to be present, nor is it a " stage of an inquiry, trial or other proceeding " within the meaning of section 429 of the Criminal Procedure Code.

(4) That testing the truth of evidence given at a trial by directing demonstrations, experiments and tests is not authorised by the Evidence Ordinance or any Statute. A judge should guard himself against appearing to assume the role of an investigator.

(5) That evidence contemplated in section 231 of the Criminal Procedure Code is the evidence referred to in succeeding sections 232, 234, 235, 236 and 237 thereof and also section 5 of the Evidence Ordinance.

(6) That evidence of experiments may not be given except by experts when they are conducted by them for the purpose of supporting or explaining their opinions which are declared to be relevant by section 45 of the Evidence Ordinance.

(7) That even section 165 of the Evidence Ordinance and section 429 of the Criminal Procedure Code afford no authority for examining or re-examining witnesses at a view of the scene.

(8) That in any event, testing the veracity of a witness is not obtaining proper proof of relevant facts or discovering relevant facts within the meaning of section 165 of the Evidence Ordinance.

(9) That a Judge of the Supreme Court holding Criminal Sessions of the Supreme Court may hold such sessions only in a public building appointed for the purpose, which all persons have a right to enter.

(10) That when evidence is recorded after the defence is closed, the accused is at a disadvantage when the further evidence taken touches aspects of the case which they were not called upon to meet when they entered on their defence. Consequently a view of the scene should not be ordered at a stage when it would not be in the interests of justice so to do.

Per WEERASOORIYA, S.P.J.—" The maxim *falsus in uno, falsus in omnibus*, is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point. But when such evidence is given by a witness, the question whether other portions of his evidence can be accepted as true should not be resolved in his favour unless there is some compelling reason for doing so."

Cases referred to : *R.* v. *D. M. A. Perera*, 57 N.L.R. 313 ; LIII C.L.W. 33.
The Queen v. *Aladin*, 61 N.L.R. 7.
The Queen v. *Vellasamy & Others*, 63 N.L.R. 265.
Gardiris Appu v. *The King*, 52 N.LR. 344.
The King v. *Atukorale*, 50 N.L.R. 256.
R v. *Whitehead*, (1929) 1 K.B.D. 99.
Karamat v. *The Queen*, (1956) A.C. 256 ; (1956) 1 A.E.R. 415 ; (1956) 2 W.L.R. 412.
Tameshwar and Another v. *The Queen*, (1957) A.C. 476 ; (1957) 2 A.E.R. 683 ; (1957) 3 W.L.R. 157.
The King v. *Seneviratne*, 38 N.L.R. 208 ; VI C.L.W. 51 ; (1936) 3 A.E.R. 36.
Smurthwaite v. *Hannay*, (1894) A.C. 494.
Baksh v. *The Queen*, (1958) A.C. 167 ; (1958) 2 W.L.R. 536.
D. P. P. v. *Christie*, 10 Cr. App. Reps. 141 ; 111 L.T. 220 ; 30 T.L.R. 471 ; 83 L.J.K.B. 1097.
Bindeshri v. *King-Emperor*, (1927) A.I.R. Allahabad 163.
Lal Singh v. *Emperor*, (1925) A.I.R. Lahore 19.
Nagina v. *Emperor*, (1921) A.I.R. Allahabad 215.
In re Sangiah, (1948) A.I.R. Madras 113.

K. Shanmugalingam, for the 2nd accused-appellant.

Neville Wijeratne (*assigned*), for the 2nd, 4th and 5th accused-appellants.

Colvin R. de Silva, with *Prins Rajasooriya* and *H. E. P. Cooray*, for the 5th accused-appellant.

S. S. Wijesinha, Crown Counsel, for the Attorney-General.

BASNAYAKE, C.J.

Five persons named Senarat Don Saineris Vidana Ralalage Don Saineris Gunasekara, Vithana Pathirennehelage Julis, Hapu Arachchige Haramanis *alias* Weeraratne, Hetti Arachchige Cyril Tissera *alias* Sira *alias* Sirisena and Kalu Arachchige Wilson Perera were indicted on charges of being members of an unlawful assembly whose common objects were house-breaking and robbery, and of using violence in prosecution of the common object of committing house-breaking and robbery. They were also charged with jointly committing house-breaking and robbery independently of the charges involving membership of an unlawful assembly. On the following motion of prosecuting counsel made in the course of the prosecution case while the first eye-witness was under cross-examination the 1st accused was discharged :—

> " Will Your Lordship permit me under section 217 (3) of the Criminal Procedure Code to withdraw the indictment against the first accused. "

At the end of the evidence of the witness Sedara learned Crown Counsel, stated—

> " These are the only witnesses whom I am calling to prove the facts other than the Police witnesses ; I am placing no further evidence other than the Police evidence."

and on the following direction of the learned Commissioner—

> " So far there is no evidence against the 3rd accused You are the sole judges of fact and if there is no evidence against the 3rd accused I do not know whether you would like to hear the case against the 3rd accused any further. If you unanimously decide not to hear the case against the 3rd accused, please tell me, then we can acquit him. It has to be a unanimous decision. You can consider the matter here or retire."

the jury after retiring for two minutes brought a unanimous verdict of not guilty against the 3rd accused.

The trial of the other accused then proceeded. They neither gave evidence nor called witnesses to give evidence on their behalf, and the only witness called for by the defence was the Clerk of Assize to prove certain statements made by the witness, Windsor Gunasekara, to the Magistrate. The 2nd, 4th and 5th accused were found guilty on counts 1, 2, 3 and 4 of the indictment and on the direction of the Commissioner they did not return

a verdict on counts 5 and 6. The accused were sentenced to separate terms of imprisonment in respect of each of the charges of which they were found guilty. Some of them were to run concurrently, others consecutively. In the result each of them became liable to undergo fifteen years' rigorous imprisonment.

Shortly the facts are as follows :—Senarath Gunasekara Vidane Ralalage Don Thomis Gunasekara (hereinafter referred to as Thomis) who lived in the village of Godigama was a wealthy land owner. In his house lived his mistress, Missie Nona and his son, Windsor, a lad, fifteen years of age. On 24th September, 1959, his house was broken into and he was robbed. It would appear that Thomis, his mistress and his son were asleep in the room in which they usually slept. Two bottle-lamps were alight in the house, one in the hall and the other in the dining room. Thomis was disturbed by the barking of dogs and in order to investigate the cause he went towards the front door followed by his mistress and son. As he approached the door some one outside said " Who is that ? " and almost immediately after that those outside banged the door and a gun was fired. Thomis went to his room and armed himself with a manna knife and as he came out the rear door was forced open by the robbers who rushed in. They snatched the manna knife from his hands and one of them pressed him against the wall and demanded money. When he said " The money is in the room " he was taken into the room. He gave the robbers a box containing Rs. 2,500/-. Then one of the robbers brought the lamp which was in the dining room. Thereafter they robbed him of the jewellery in the wooden chest in that room. Then two of the robbers brought his son and his mistress into that room and his son was made to stand by some bags of paddy in the room and his mistress was made to sit down. Next they demanded money from his mistress. She gave them the money that was in her hand-bag. They demanded more money from Thomis and when he said that he had already handed them all his money Saineris, the 1st accused, who was not one of those who had originally rushed in, came up with a gun and placed it against his chest and was preparing to shoot him when his mistress cried out " Saineris Aiya, what is this crime you are going to perpetrate ? " Saineris then withdrew and one of the robbers remarked " These fellows have more than fifty thousand rupees and they will not give the money till the son is murdered. Stab him with a knife ". One of the robbers went up to his son with upraised knife. The son in fear cried " O father ! Give the money you have ". Thereupon Thomis offered to hand over the money and one of the robbers brought his bunch of keys from under his pillow. He opened one of the drawers to get at the secret drawer and as he reached it one of the robbers pulled it out and took three tins from it containing Rs. 13,000/-. Thereafter the robbers put out the lamp and locked the door and went away. After about fifteen minutes Thomis unlocked the door and along with his mistress went to the house of their neighbour, Aron, his mistress's elder brother. It was raining heavily at the time.

Only two of the robbers were identified at the time of the robbery. They were the 1st accused, Saineris and the 2nd accused, Julis. They were persons known to the occupants of the house. The former was identified by Thomis and Windsor and the latter by the witness, Sedera, who was sleeping in the verandah of the house. It is not clear why the prosecution did not call Missie Nona, a witness whose name was on the back of the indictment, and one of the persons who was robbed that night and who had an equal opportunity of identifying the robbers as Thomis and Windsor. The 4th and 5th accused were arrested by the Police on suspicion on 14th and 15th October, respectively, and were identified by Thomis and Windsor as two of the robbers that entered their house, both at the trial and earlier at an identification parade held by Police Sergeant Edirisinghe, on 19th October, 1959, on the orders of the Magistrate. The case against these two accused rests entirely on the identification of them by Thomis and Windsor. The evidence of Thomis as to the identity of the 5th accused is as follows :—

" 279. *Q.* Did you see him after this incident ?
A. I pointed out that man at the identification parade.
280. *Q.* So you first saw that man when he went towards your son with a knife in his upraised hands ?
A. Yes.
281. *Q.* And the next occasion on which you saw him was at the identification parade when you pointed him out ?
A. Yes.
282. *Q.* Can you point out that person ?
A. He is the fifth accused.
283. *Q.* Are you going by the numbers ?
A. Yes. He is the person standing at that corner (points out).

285. *Court :*

Q. You do not know his name ?

A. No. It was only after his name was mentioned in Court that I came to know it."

Windsor's evidence as to the identity of the 4th and 5th accused is as follows :—

" 816. *Q.* Did you see the person who struck you ?

A. I can identify him if seen.

817. *Q.* In fact, at an identification parade subsequently held did you identify him ?

A. Yes.

818. *Court :*

Q. That is the man who hit you on the left shoulder ?

A. Yes.

Court : Let the accused stand up when they are referred to.

819. *Q.* You can see the numbers placed against the accused—2, 3, 4 and 5 ?

A. Yes.

Court : No. 1 is vacant.

820. *Q.* By reference to the numbers behind which they are standing, can you point out the person who struck you ?

A. Yes.

821. *Q.* What is the number in front of him ?

A. No. 4.

822. *Q.* Is he the person who struck you, the fourth accused ?

A. Yes.

823. *Q.* Was that the first occasion on which you had seen him, the occasion on which he hit you ?

A. Yes.

824. *Q.* In between those two occasions, in between the occasion when you saw him that night and the occasion on which you identified him at the identification parade, did you see the fourth accused ?

A. No.

841. *Q.* At any stage were you threatened ? Did anybody threaten you at any stage ?

A. Yes.

842. *Q.* In what manner were you threatened ?

A. A robber came to stab me.

843. *Q.* Who ?

A. An unknown person.

844. *Court :*

Q. Is he here ?

A. Yes.

845. *Q.* Can you point him out ?

A. That is the fifth accused.

846. *Q.* You said that the fifth accused was a person unknown to you that night ?

A. Yes.

847. *Q.* Did you subsequently identify the fifth accused at an identification parade ?

A. Yes."

The evidence of the Police Sergeant as to the identification of the 4th and 5th accused by Thomis and Windsor, respectively, is as follows :—

THOMIS

" 1366. *Q.* What did you ask this witness to do ?

A. I informed the witness to point out the persons or person who entered his house on the night of 24.9.59 and committed robbery and used force on them if anyone of them was in the line.

1367. *Q.* Then what happened ?

A. Then he carefully examined the line of men and pointed out the 4th and 5th accused."

WINDSOR

" 1374. *A.* Thereafter I sent the Court Aratchie to bring witness, Windsor Gunasekera.

1375. *Q.* After the Court Aratchie was sent did you ask the suspects to change their attire or their places if they wish ?

A. Yes, and they elected to remain in their same place and in the same attire.

1376. *Q.* Then was Windsor Gunasekera brought to Court ?

A. Yes. Then I informed Windsor Gunasekera to point out the persons or person who entered their house on the night of 24.9.59 and committed robbery and used force on them if anyone of them were in the parade.

1377. *Q.* Then ?

A. Then the witness went along the line of men, examined the men carefully in the line and pointed out the 4th and 5th accused."

It is unfortunate that in the instant case the Magistrate instead of holding the identification parade himself delegated this important function to Police Sergeant Edirisinghe. It has resulted in the parade being of little use as the meaning of what Thomis and Windsor did is left in doubt. They said nothing at the parade and we are left in uncertainty as to what was in their minds at the time they pointed out the two accused. As was observed by Lord Moulton in *Christie's* case (10 Cr. App. R. 141, at 159 H.L.), " Identification is an act of the mind and the primary evidence of what was passing in the mind of a man is his own testimony, where it can be obtained ". But in answer to the complex direction of the Sergeant each of them pointed out the 4th and 5th accused. In that state of evidence of identification at the parade leading questions put to the witnesses further impaired their evidence at the trial. Both Judge and counsel appear to have lost sight of the fact that the identification of accused at a parade

held before the trial is not substantive evidence at the trial. The fact that the witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification at the trial. The jury may act only on the evidence given before them. There is no section of the Evidence Ordinance which declares proceedings at an identification parade to be evidence of the fact of identity. The principal evidence of identification is the evidence of a witness given in Court as to how and under what circumstances he came to pick out a particular accused person and the details of the part which the accused took in the crime in question. The evidence of Thomis at the trial does not go beyond identifying the 5th accused as the man who went towards his son with upraised knife. He ascribes no specific act to the 4th accused. Windsor's evidence at the trial was to the same effect, except that he added that the 4th accused was the man who struck him. The learned Commissioner has omitted to point out to the jury that the evidence of identification at the parade is not substantive evidence but a circumstance corroborative of the evidence of identification in Court. When statements are made at an identification parade, they may be used under section 157 to corroborate the identifying witness or under section 155 to contradict him. In the instant case no statement was made by the witnesses at the parade and, therefore, no question of corroboration under section 157 arises. Even if the witnesses had made statements indicating what they had in mind when they pointed out the two accused those statements would not have been admissible for corroborating them as section 157 only permits the use of statements made before an authority legally competent to investigate the fact. Now Sergeant Edirisinghe was not such an authority. The authority contemplated in section 157 is an authority other than an officer inquiring into an offence under Chapter XII, for, statements made to a Police Officer in the course of an inquiry under that Chapter cannot be used to corroborate. There is a long line of Indian decisions on the subject of the evidentiary value of identifications at extra-judicial parades. Some of the better known decisions are referred to in the footnote at the end of this judgment.*

* 1. *Bindeshri* v. *King-Emperor* (1927) A.I.R. All. 163
2. *Lal Singh* v. *Emperor*, (1925) A.I.R. Lahore 19.
3. *Nagina* v. *Emperor*, (1921) A.I.R. All. 215.
4. *In re Sangiah*, (1948), A.I.R. Madras 113.

The procedure adopted by the learned Commissioner in the visit to the place of the alleged crime next calls for consideration. On 1st November, 1961, the third day of trial, the learned Commissioner stated in Court—

> " I think it is desirable to visit the scene of the incident in this case, and I think it would be more convenient to do that after all the evidence has been led. Shall we fix it for tomorrow morning at 10 o'clock ? Will that suit you gentlemen ? "

To this question the Foreman said " Yes ". On 3rd November (the transcript does not show what happened on 2nd November) after the case for the prosecution and the defence had been closed, the Commissioner, the jury, counsel, the witnesses, the accused and the Court staff visited the house of Thomis. There the Commissioner first examined on oath the witnesses, Sedara, Police Inspector Dhanapala Weerasooriya, Thomis, and the photographer, Jinapala Jayasuriya. The Commissioner recalled and questioned the witnesses, Dhanapala Weerasooriya twice, Sedara twice, and Thomis nine times. The transcript contains the following minutes regarding the movements of the Commissioner :—

> (*a*) " 11.25 a.m.—Court leaves the house of Thomis Gunasekera and proceeds along the road in front of the house said to be leading to Aron's house up to a distance of 75 yards and stops at a bend."
>
> At the bend Thomis was examined at length.
>
> (*b*) " 11.35 a.m.—Court leaves the scene and arrives at the Gampaha Police Station at 11.55 a.m. (At the Gampaha Police Station premises in the front verandah facing the road)."

There it was that the Commissioner examined Arlis Perera.

> (*c*) " 12.03 p.m.—Court leaves the Gampaha Police Station and arrives at Magistrate's Court, Gampaha, at 12.05 p.m."
>
> There the Commissioner examined Arlis Perera once more.
>
> (*d*) " Court arrives at the verandah of the Remand Cell."

At this place Arlis Perera was examined by the Commissioner for the third time.

(*e*) " 12.10 p.m.—Court leaves the Remand Cell and arrives at the Magistrate's Court at 12.12 p.m."

There Thomis was examined for the eighth time.

(*f*) " Court leaves the Court-house and goes up to the Record Room of the Magistrate's Court."

There Thomis was examined for the ninth time.

(*g*) " Court leaves Magistrate's Court, Gampaha, at 12.15 p.m. and returns to Supreme Court, Negombo, at 1.00 p.m."

(*h*) " 1.05 p.m.—Court re-assembles and adjourns for lunch."

The minutes in the transcript do not show where the jury were while the Commissioner was moving from place to place, and whether they were in a body under the care of an officer of the Court while the witnesses were being examined by the Commissioner at the different places he visited. There is also nothing to indicate that what was said by the witnesses examined by the Commissioner was heard by each and everyone of the jurors.

The proceedings at the view occupy seventeen pages of the transcript and 104 questions were asked from the witnesses who were examined by the Commissioner. The vast majority of the questions were asked by the Commissioner himself. The procedure adopted by the Commissioner in this case is without precedent and is certainly not authorised by section 238 of the Criminal Procedure Code which reads—

" (1) Whenever the Judge thinks that the jury should view the place in which the offence charged is alleged to have been committed or any other place in which any other transaction material to the trial is alleged to have occurred the Judge shall make an order to that effect ; and the jury shall be conducted in a body under the care of an officer of the Court to such place which shall be shown to them by a person appointed by the Judge.

(2) Such Officer shall not except with the permission of the Judge suffer any other person to speak to or hold any communication with any member of the jury ; and unless the Court otherwise directs they shall, when the view is finished, be immediately conducted back into Court."

The above section provides for the jury being conducted in a body under the care of an officer of the Court to the place in which the offence charged is alleged to have been committed *or* any other place in which any other transaction material to the trial is alleged to have occurred which shall be shown to them by a person appointed by the Judge. As the enactment expressly provides that the person under whose care the jury are to be conducted to the scene shall be an officer of Court and does not enact a similar requirement in regard to the person whom the Judge should appoint to show the jury the place, any person acquainted with the place may be so appointed. The section does not provide for the attendance of the Judge, counsel, witnesses, stenographers or any other officers of the Court. Sub-section (2) provides that the officer conducting the jury to the place should not permit, any person other than the one appointed by the Judge to show them the place, to speak to or hold any communication with the jury except when the Judge has granted such permission. The section does not empower the Judge to hold an inquiry or investigation in the presence of the jury or record any evidence. Except when the statute so authorises, proceedings such as the taking of evidence are not meant to be taken in any place other than the Court-house. There is no section of the Criminal Procedure Code or of any other enactment which provides for the examining of witnesses, the carrying out of experiments, or the making of tests at the place viewed by the jury as has been done in the instant case.

Apart from the fact that the Commissioner has by examining witnesses and taking evidence and as it were holding a sitting of the Court acted illegally, he has also failed to take the imperative precautions prescribed in the section. An order that the jury should view the scene of the crime as required by sub-section (1) of the section 238 has not been made. The order contemplated therein is a formal order giving the reasons for it and not a bare minute or record as in the instant case. He has also omitted to appoint an officer of the Court under whose care the jury had to be conducted to the view, nor did he appoint a person to show the jury the place. All these are imperative requirements of the statute which the Judge is bound to observe and are conditions precedent to a view by the jury. The presence of the presiding Judge at the view does not cure the breach of the statute. The previous decisions of this Court in the case of *Regina* v. *D. M. Arthur Perera* (57 N.L.R. 313) and *The Queen* v. *H. H. Aladin* (61 N.L.R. 7) also emphasize that the jury may view the scene of an offence only within the

limits of section 238. The *dicta* of the Privy Council in *Karamat* v. *The Queen* (1956) A.C. 256, and *Tameshwar and another* v. *Reginam* (1957) A.C. 476, should be read subject to the provisions of our Courts Ordinance, the Criminal Procedure Code, and the Evidence Ordinance. In delivering the decision of the Board in the latter case Lord Denning said—

> "In England it is a rare thing for a jury in a criminal trial to view the place where the crime is said to have taken place. At one time it was never done at the assizes except with the consent of the prosecution. But in a case in 1847 on a trial for rape, the defence wished the jury to have a view, in order to support the contention that it was so public a place that it was unlikely for the offence to have taken place there. The prosecution did not consent, but nevertheless the Judge allowed a view. It was regarded as a thing of such moment that the jury were accompanied by the under sheriff, the chief constable, 20 policemen and 12 javelinmen ; but the Judge apparently did not go with them. Nor did the prisoner. It is to be noticed that there were no witnesses (See *Reg.* v. *Whalley*, (1847) 2 Car & K. 376). Such a view is on a par with the common case where a thing is too large or cumbrous to bring into Court but is left in the yard outside. It is everyday practice for the jury in such a case to be taken to see the thing. The Judge sometimes goes with them. Sometimes he goes by himself. But there are no witnesses and no demonstration. Their Lordships see nothing wrong in a simple view of that kind, even though a Judge is not present."

Our section seeks to provide for just that kind of view referred to in the words of Lord Denning. In *Regina* v. *Arthur Perera* (*supra*) this Court, while affirming that the kind of view contemplated by our section was a view pure and simple with no demonstrations, refused to set aside a conviction on the ground that there had been a demonstration by the Inspector standing at a window of the house viewed and inserting his hand through the grille. In the later case of *The Queen* v. *Aladin* (*supra*) this Court, while disapproving of the course adopted by counsel in seeking to place evidence before the jury at the view in the absence of the Judge, made certain observations *obiter* which indicate that what may not be done in the absence of the Judge may be done if the Judge is present. Those observations must be treated as made *per incuriam* in the light of what has emerged from a reconsideration of the whole question. A view ordered under section 238 is not a part of the trial for the reason that persons whose presence is essential to a trial such as the Judge, the accused and the respective counsel are not required to be present. Nor is there power conferred thereunder to compel the accused and witnesses to attend. That being the case, the opinion expressed by the Privy Council in the British Guiana cases of *Tameshwar* (*supra*) and *Karamat* (*supra*) that a view is a part of the trial does not apply to a view under section 238. If it is not a part of the trial, proceedings such as demonstrations and the examination of witnesses cannot be properly taken at a view even if the Judge chooses to attend the view himself. For his presence cannot convert what under the Code is not a part of the trial to a sitting of the Court. In *The King* v. *Seneviratne* (38 N.L.R. 208) the Privy Council, while not seeking to interpret the express words of section 238, said—

> ". . . Section 238 of the Criminal Procedure Code (No. 15 of 1898) provides for a view by the jury and lays down definite and strict conditions for its conduct. Section 165 of the Evidence Ordinance provides for the Judge asking questions at any time of any witness. The proceedings on June 8, 1934, seem to have been a combination of a view and a further hearing with the introduction of some features permitted by neither procedure, such as the performance of an experiment with chloroform by a Dr. Pieris, who does not appear to have been sworn as a witness, the Judge and the foreman of the jury being somewhere else. The jurors seem also to have been divided for the purpose of other experiments in sight and sound and to have been asked questions as to the impressions produced on their senses. Their Lordships have no desire to limit the proper exercise of discretion or to say that no view by a jury can include an inspection or demonstration of relevant sounds or smells ; but they feel bound to record their view that there were features in the proceedings of June 8 which were irregular in themselves and unnecessary for the administration of justice."

Some of the above observations which are *obiter* appear to go beyond the ambit of section 238.

Under the legal system where both the adjective and the substantive criminal law are codified the Judge in a trial by jury is not entitled to travel outside the statute and devise a procedure unwarranted by it. The Evidence Ordinance provides certain methods of testing the credibility of a witness. Testing the truth of evidence given at a trial by directing demonstrations, experiments and tests is not authorised by any statute. Besides, it is no part of the presiding Judge's function to direct the carrying out of experiments or tests for the purpose of ascertaining whether the witnesses have spoken the truth or not. A Judge should guard himself against appearing to assume the role of investigator. Chapter XX which lays down the procedure to be followed at trials before the Supreme Court prescribes the respective functions and duties of the Judge, the jury, the prosecution and the defence. There is a further objection to demonstrations, tests and experiments at a view by the jury. In terms of section 231

of the Criminal Procedure Code, upon being sworn, the jury are in every case admonished by the Registrar that it is their duty to listen to the evidence and upon that evidence to find by their verdict whether or not the accused is guilty of the charge or any of the charges, if more than one, laid against him in the indictment. The evidence is the evidence which is referred to in the succeeding sections 232, 233, 235, 236 and 237. Evidence is defined in the Evidence Ordinance thus—

> " 'Evidence' means and includes—
>
> (*a*) all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry ; such statements are called oral evidence.
>
> (*b*) all documents produced for the inspection of the Court ; such documents are called documentary evidence."

In view of section 5 of the Evidence Ordinance, evidence may be given of the existence or non-existence of every fact in issue and of such other facts as are declared to be relevant and of no others. Evidence of experiments may not be given except by experts when they are conducted by them for the purpose of supporting or explaining their opinions which are declared to be relevant by section 45 of the Evidence Ordinance. Nothing should, therefore, be done or said at the view by anyone which the jury are to take into account in deciding the case. The fact that the Commissioner has questioned the witnesses many times and asked them many questions calls for notice. Even in proceedings in Court the power conferred by the section is " in order to discover or obtain proper proof of relevant facts ". Testing the veracity of witnesses is not obtaining proper proof of relevant facts or discovering relevant facts. Apart from that where in a jury trial the presiding Judge asks questions about facts which are irrelevant, he is, in view of the proviso to that section bound to warn the jury against basing their verdict on any facts which are not declared by the Ordinance to be relevant. The proviso which reads, " Provided that the judgment must be based upon facts declared by this Ordinance to be relevant and duly proved", makes it necessary that the power conferred by section 165 should be exercised in trials by jury with great care ; because in certain circumstances no amount of caution can wipe out the harm done by irrelevant matter being placed before the jury.

It is not clear whether the learned Commissioner had in mind section 429 of the Criminal Procedure Code when he recalled and re-examined witnesses who had given evidence and even examined a witness who had not given evidence previously. If he did, he appears to have lost sight of its terms. That section reads—

> " Any court may at any stage of an inquiry, trial, or other proceeding under this Code summon any person as a witness or examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case. "

The expression " proceeding " particularly in view of the preceding word " other " must be construed *ejusdem generis* with inquiry and trial.

As has been pointed out above, a view by the jury under section 238 is not a stage of " an inquiry, trial or other proceeding under this Code ". It is the " Court " that is given the right to summon, examine and re-examine witnesses. The Judge who chooses to attend the view by the jury cannot be properly described as the Court. The expression " Court " in that section does not mean the Judge wherever he may happen to be. It can only mean the Judge sitting in the Court-house exercising the judicial duties of his office. That expression is not defined in the Criminal Procedure Code, but it is defined in the Courts Ordinance and reads as follows :—

> " 'Court' shall denote a Judge empowered by law to act judicially alone, or a body of Judges empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially; "

When the Commissioner decided to attend the view by jury, though under no legal obligation to do so, he had no power to exercise his functions and duties as presiding Judge at that place. His presence at the scene can only be warranted on the ground that he is there for the purpose of seeing for himself what the jury were to be shown. For, otherwise, he would be under the disadvantage of not having seen what the jury had viewed.

Section 165 of the Evidence Ordinance and 429 of the Criminal Procedure Code, therefore, afford no authority for summoning and examining or re-examining witnesses at a view of the scene and the Commissioner's action was illegal. This

aspect of sections 165 and 429 was not examined in the judgment in *Aladin's* case (*supra*), and the following observations in that case must be regarded as made *per incuriam* :—

" We wish to guard ourselves against what we have said above being understood to mean that at a view of the scene witnesses cannot be asked to demonstrate or explain something which needs explanation or take up certain positions which they say they occupied at the time the crime was committed. Witnesses can be asked to give demonstrations or explanations but such demonstration and explanation must be given in the presence of the Judge and jury. How essential it is that the Judge should be present at a view is emphasised not only in *Tameshwar's* case but also in the case of *Karmat* (*supra*) where Lord Goddard in dismissing the appeal to the Privy Council said—

' Here everything was done in the presence of the Judge, who throughout was in control of the proceedings. It was eminently desirable that he should be present, and it is possible that, had he not been, a different result would have followed. '

At a view directions to witnesses and other questions, if any, to them should come from Judge and not from the jury or counsel; but it is open to counsel or the jury to suggest them to the Judge so that he may decide whether a particular direction should be given or question asked. "

Both *Karamat's* case and *Tameshwar's* case (*supra*) proceed on the assumption that in British Guiana the Court can be held at any place viewed by the jury and that if witnesses give demonstrations or answer questions the view becomes a part of the trial and that if the Judge is present demonstrations may be given or questions asked. But our law is different. A Judge of the Supreme Court holding criminal sessions of the Supreme Court may hold such sessions only in a public building appointed for the purpose which all persons have a right to enter in order freely to attend the sessions. There are two further reasons for holding that a view by the jury cannot be regarded as a part of the trial or a proceeding of the Court. The first is that the holding of criminal sessions of the Supreme Court outside the precincts of the building appointed for the purpose is not warranted by the Courts Ordinance or any other enactment. Magistrates alone are under our law authorised to sit at any convenient spot (section 53, Courts Ordinance). It is well-established that what is not warranted by law is illegal (*Smurthwaite* v. *Hannay*, (1894) A.C. 494, at 501). This principle applies with greater force in a system where the law is codified. The second is that section 85 of the Courts Ordinance requires that the sittings of every Court within Ceylon shall be public, and all persons may freely attend the same. The place at which an offence has been committed is generally not a place to which all persons can be freely admitted. To hold a sitting of the Court at such a place would be obnoxious to section 85.

In the instant case the visit to the scene was after the prosecution and defence had closed their respective cases. By itself there seems to be no obection to a view at the end of the case. The section imposes no restriction on the stage of a trial at which the view may take place. No hard and fast rule can be observed but a view should not be ordered at a stage when it would not be in the interests of justice so to do. But when evidence is recorded after the defence is closed the accused are at a disadvantage when the further evidence taken touches aspects of the case which they were not called upon to meet at the time when they entered on their defence. The evidence taken by the Commissioner brought out new matter which the prosecution had not brought out. What happened in the instant case can aptly be described in the words of *The King* v. *Seneviratne* as " a combination of a view and a further hearing with the introduction of some features permitted by neither procedure ".

One more question remains for consideration, and that is whether the learned Commissioner's direction, that although Thomis and Windsor were admittedly implicating Saineris falsely, it was still open to the jury to act on their evidence against the 4th and 5th accused. His charge on this point reads :—

" On the other hand you will also take into consideration the evidence of Thomis and his son Windsor, that they saw the first accused, Saineris, who is a relation of theirs, with a gun inside the house. Is it likely that Saineris, who was well-known to them, even if he organised such a robbery, is it likely that he would have gone about showing his face ? If Saineris and his son gave false evidence on that point.

Crown Counsel : Thomis.

Court : I am sorry. Did I say Saineris ?

Crown Counsel : Yes.

Charge to the Jury continued: I am very sorry. You will have to take that into consideration. The defence suggestion is that man who is capable of implicating somebody else, a man who is capable of implicating the first accused falsely, may be implicating the other accused also falsely. That is a matter to which you will give due consideration. On the other hand, it would be still open to you to say that Thomis and his son, Windsor, had a motive to implicate falsely the first accused but they do not have a motive to implicate the other accused falsely. They may have suspected Thomis—they may have suspec-

ted Saineris as having been a party to this burglary because of the ill-feeling that existed between them and they may have implicated Saineris for that reason, but have they any reason to implicate any one of these other accused falsely? Therefore, you may be disposed to reject their evidence implicating the first accused on that account but to accept the rest of the evidence, or you may as I told you earlier consider that that taints the whole of the evidence, you may consider this of such vital importance, and reject the rest of the evidence. It is open to you to do either. "

Falsus in uno, falsus in omnibus or *Falsum in uno falsum in omnibus*, both forms are in use, (he who speaks falsely on one point will speak falsely upon all) is a well-known maxim. In applying this maxim it must be remembered that all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration, or mere embroidery or embellishment, must be distinguished from deliberate falsehood. Nor does it apply to cases of conflict of testimony on the same point between different witnesses. In *Baksh* v. *The Queen*, (P.C.)•(1958) A.C. 167, at 172, the Privy Council in applying this maxim to a case of co-accused in a case from British Guiana said, " Their credibility cannot be treated as divisible and accepted against one and rejected against the other ". In the instant case there are no circumstances which exclude the application of the maxim and as the sole testimony against the accused is that of these two witnesses, the learned Commissioner's direction that it was open to them to act on the evidence of Thomis and Windsor against the 4th and 5th accused is contrary to the maxim. There is nothing that distinguishes their testimony against the 4th and 5th accused from their perjured testimony against the 1st accused. When the only evidence on which the jury are told they may act is the evidence of admitted perjurers whose testimony even the prosecution does not hold out as true against one accused, it would be wrong for them to convict the other accused on the testimony of the perjurers unless there is something positive which distinguishes the case of the others. In a case such as the one before us the proper direction is that it is not open to them to convict on the testimony of the witnesses whom the prosecution itself had admitted were witnesses who had falsely implicated the 1st accused. The illegalities above referred to are, in my opinion, fatal to the conviction of all the appellants.

In view of the importance of the questions of law that arise for decision in this case I have thought it fit that separate judgments should be pronounced.

WEERASOORIYA, S.P.J.

The three appellants were convicted on charges of : (*a*) being members of an unlawful assembly the common objects of which were to commit house-breaking and robbery ; (*b*) using violence in prosecution of the said common objects ; and (*c*) committing house-breaking and robbery in prosecution of the said common objects, offences punishable under sections 140, 144 and 443 and 380, read with section 146, of the Penal Code. They were sentenced to various terms of imprisonment and have filed these appeals and applications against their convictions and sentences.

The appellants, who were the 2nd, 4th and 5th accused at the trial, were jointly tried with the 1st and the 3rd accused. The case for the prosecution, shortly, is that they, along with others unknown, broke into the house of one Don Thomis Gunasekera on the night of the 24th September, 1959, and committed robbery of cash and articles valued at Rs. 17,530/-. At the time of the entry Don Thomis Gunasekera, his mistress Missi Nona and their son, Don Windsor, were sleeping in a bedroom in the house while Sedera, a servant, was sleeping in the front verandah. The prosecution called as witnesses at the trial all these persons except Missi Nona.

The 1st accused is an illegitimate son of a brother of Don Thomis Gunasekera, and according to the latter, when the robbers were demanding money and jewellery from him and Missi Nona, the 1st accused entered the room armed with a gun which he placed against the chest of Don Thomis, but when Missi Nona remonstrated at this the 1st accused desisted from further participation in the robbery and left the scene. Don Thomis stated that after the 1st accused went away one of the robbers remarked, " These fellows have more than fifty thousand rupees and they will not give the money till the son is murdered. Stab him with a knife ", and then the 5th accused (the 3rd appellant) who at the time was a stranger but whom he subsequently identified at an identification parade held in the Magistrate's Court of Gampaha, went up with knife upraised towards Don Windsor, who appealed to his father to give the robbers the money they wanted. Don Thomis stated, further, that at the identification parade he also identified the 4th accused (the 2nd appel-

lant) as one of the robbers, but in examination-in-chief he did not assign to the 4th accused the doing of any specific act. It was elicited from Don Thomis in cross-examination that at the time of the house-breaking and robbery he was not well-disposed towards the 1st accused as a result of a dispute over the possession of a field called Delgahakumbure and that a case which he had filed against the 1st accused charging him with criminal trespass in having entered that field was pending.

At the conclusion of the evidence of Don Thomis Gunasekera, who was called before Don Windsor and Sedera, Crown Counsel applied under section 217 (3) of the Criminal Procedure Code to withdraw the indictment against the 1st accused. Crown Counsel stated that although there was other evidence against the 1st accused—he was referring to the evidence of Don Windsor whom he had not yet called—he did not think that such evidence would take the case against the 1st accused any further. The application of Crown Counsel was allowed by the trial Judge and the 1st accused was discharged. Notwithstanding the evidence of Don Thomis Gunasekera implicating the 1st accused, and that evidence of a similar nature was expected from Don Windsor, the main consideration which moved Crown Counsel to make, and the trial Judge to allow, this application appears to have been that the evidence of these two witnesses as to what the 1st accused did could not be accepted as true seeing that they failed to mention his name to any of the neighbours who turned up soon after the robbery as one of those who took part in it, and also that Don Thomis Gunasekera had a motive for falsely implicating the 1st accused.

Don Windsor on being called stated in examination-in-chief that among the robbers who entered the house were the 4th accused, who gave him a blow on the back of the left shoulder, and the 5th accused, who tried to stab him, that he had not seen either of them before and that he subsequently identified them at the identification parade. This witness was not questioned by Crown Counsel about the 1st accused, but in cross-examination he gave evidence on the same lines as Don Thomis Gunasekera against the 1st accused.

Sedera said that when he was sleeping in the verandah a crowd of persons rushed in, he asked, "who is that?" and then he was given a blow and held against the wall by the 2nd accused (the 1st appellant) and kept there, while the others went away from the verandah. The 2nd accused continued to hold him against the wall for about quarter-of-an-hour and he was then ordered to sit down and the mat on which he was sleeping was placed over his head and he was told to remain there and that he would be murdered if he raised cries. Sedera says that after a few minutes, realising that he was alone, he removed the mat from his head and ran away and hid himself in a ditch. After some time he went into the kitchen of the Don Thomis' house and there he saw Don Thomis seated on a bench and bewailing his loss. He also saw Aron Singho, a brother of Missi Nona, and several others who had come there after the robbers went away. He told Aron that Julis (the 2nd accused) assaulted him and that as a result he had a split lip. Sedera said that he knew the 2nd accused for about four to five years, and that the 2nd accused lived on a land adjoining the residing land of Don Thomis Gunasekera.

Aron confirmed that Sedera told him that he had been held down and assaulted by Julis and that he noticed a bleeding injury on Sedera's lip. Aron also stated that he went to the Police Station and gave information of what happened, including what Sedera told him, and that the only person among the robbers whom he mentioned as having been identified was Julis. A certified copy of the statement made by Aron was produced marked P 10 by the police officer who recorded it.

After Aron had given evidence, Crown Counsel informed the Court that the only other evidence he proposed to call was the evidence of certain police officers. So far no evidence had been led against the 3rd accused, and on the direction of the trial Judge, the Jury brought in a verdict of not guilty in his favour and he was acquitted. The trial then proceeded against the 2nd, 4th and 5th accused (the appellants), with the result already stated.

The Police arrested the 4th and 5th accused on the 14th and 15th October, 1959, respectively. The nature of the information leading to their arrest has not been disclosed in evidence, but it was not in consequence of any description of the robbers given by Don thomis Gunasekera or other inmates of his house. Thereafter an identification parade was held in the Magistrate's Court on the 19th October, 1959, by Police Sergeant, Edirisinghe, acting on the orders of the Magistrate. The 4th and 5th accused were lined up in this parade along with 12 others. Sergeant

Edirisinghe requested Don Thomis and Don Windsor, as each of them was brought into Court, to point out the person or persons who came on the night of the 24th September, 1959, and committed the robbery and used force on them, and each of them pointed out to the 4th and 5th accused. The case against the 4th and 5th accused rests entirely on the fact that they were identified at this parade by Don Thomis and Don Windsor and on the evidence testifying to that fact given at the trial by these witnesses and Sergeant Edirisinghe.

One of the grounds formulated in the applications for leave to appeal filed by the appellants is that the verdict of the Jury is unreasonable and cannot be supported by the evidence. This ground involves the question whether the Jury should have acted on the evidence of Don Thomis Gunasekera and Don Windsor that the 4th and 5th accused were two of the persons who took part in the robbery, when, in moving to withdraw the indictment against the 1st accused, the Crown had virtually conceded that the same two witnesses were not worthy of credit in regard to their evidence implicating the 1st accused. In *Gardiris Appu* v. *The King*, 52 N.L.R. 344, this Court had occasion to make the following observations as to the courses open to a Jury where false evidence had been introduced into a case by the prosecution witnesses : " In such a case the jury can do one of two things. It is open to them to say that the falsehoods are of such magnitude as to taint the whole case for the prosecution and that they feel it would be unsafe to convict at all. On the other hand, it is equally open to them, if they think fit to do so, to separate the falsehoods from the truth and to found their verdict on the evidence which they accept to be the truth ". In the present case these observations were repeated almost verbatim by the learned trial Judge in the course of his charge to the Jury, but no directions were given to them regarding the test to be applied in deciding what portion, if any, of the evidence of Don Thomis Gunasekera and Don Windsor against the 4th and 5th accused could be accepted as representing the truth, once their evidence against the 1st accused has been rejected as false.

In *The Queen* v. *Vellasamy and others*, 63 N.L.R. 265, it was held that the evidence of a witness which is unacceptable in respect of one offence cannot reasonably afford good ground for convicting the accused of another offence. The charge in that case was one of murder. The Jury found the accused not guilty of that offence but guilty of the offence of causing disappearance of evidence of the commission of homicide. For proof of either offence the prosecution relied on the evidence of one and the same witness. The verdict of the Jury finding the accused guilty of the offence of causing disappearance of evidence of the commission of homicide had necessarily to be based on an acceptance of a part, if not the entirety, of the evidence of this witness, whom the Jury had, presumably, disbelieved when they found the accused not guilty of the offence of murder. The conviction of the accused was, accordingly, quashed and judgment of acquittal entered.

Another case which is relevant to the question under consideration is *Baksh* v. *The Queen*, (1958) A.C. 167, decided by the Judicial Committee of the Privy Council and referred to in the judgment of this Court in *The Queen* v. *Vellasamy and Others* (*supra*). In that case two persons, Nabi Baksh and Fiaz Baksh, were convicted of murder. The case for the prosecution was that the deceased man was killed one night by shots from a gun fired by one or other of the accused acting together in furtherance of a common intention. The defence of each accused was an alibi. The case against the accused rested largely on their identification by three witnesses, two of whom, according to the statements made by them to the police, which the Court of Criminal Appeal permitted to be produced at the hearing of the appeals preferred by the accused against their convictions, had not spoken to having seen Nabi Baksh at all. These statements had not been produced at the trial. The Court of Criminal Appeal dismissed the appeal of Fiaz Baksh but allowed the appeal of Nabi Baksh and ordered a new trial in his case. Subsequently the Crown entered a *nolle prosequi* in respect of Nabi Baksh. Fiaz Baksh appealed by special leave to Her Majesty in Council. The Privy Council allowed the appeal and remitted the case to the Court of Criminal Appeal with a direction that the Court should quash the conviction and either enter a verdict of acquittal or order a new trial, whichever course the Court may consider proper in the interests of justice. The Privy Council also made the following observations regarding the two witnesses who had failed to refer to the presence of Nabi Baksh in their statements to the Police : " Their credibility cannot be treated as divisible and accepted against one and rejected against the other. Their honesty having been shown to be open to question, it cannot be right to accept the verdict against one and re-open it in the case of the other. Their

Lordships are accordingly of the opinion that a new trial should have been ordered in both cases ".

Despite the above observations, the direction given by the Privy Council would imply that had the Court of Criminal Appeal considered it proper to order a new trial of the accused Fiaz Baksh, it was open to the Jury at the new trial to find him guilty of the offence of murder on the testimony of the same three witnesses who claimed to have identified him, notwithstanding that the veracity of, at least, two of them in regard to their evidence identifying Nabi Baksh was gravely suspect, and that even in the case of the remaining witness, the Crown, apparently, was not prepared to put him forward as worthy of credit when he purported to have identified Nabi Baksh.

The maxim *falsus in uno, falsus in omnibus*, is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point. But when such evidence is given by a witness, the question whether other portions of his evidence can be accepted as true should not be resolved in his favour unless there is some compelling reason for doing so. In the present case the most that can be urged for accepting the evidence of Don Thomis Gunasekera and Don Windsor implicating the 4th and 5th accused is that each of them in turn picked out these two accused from among those lined up in the identification parade as two of the robbers. It is in evidence that the Gampaha Police Station is just by the road leading from the Remand Cell to the Railway Station and that the 4th and 5th accused, after being remanded to Fiscal's custody, had been taken on foot along this road to the Railway Station to be sent to Colombo. Don Windsor stated in the Magistrate's Court that he had been to the Police Station seven or eight times after the commission of the robbery, but at the trial he said that he had been there only twice and that he could not remember having stated in the Magistrate's Court that he had gone there seven or eight times. On the day on which the identification parade was held the 4th and 5th accused were brought from Colombo in a covered van, first to the Remand Cell and then to the Magistrate's Court. The parade was held only at about 4.15 p.m. but, for a reason which is unexplained, both Don Thomis Gunasekera and Don Windsor had been kept at the Police Station from 7 a.m. till 4 p.m. These items of evidence were elicited by the defence as supporting the suggestion that prior to the identification parade the two witnesses had either been shown the 4th and 5th accused, or been given such particulars relating to them as would have facilitated their identification at the parade.

Evidence relating to the identification of an accused at an identification parade by a witness who is subsequently called at the trial and gives evidence implicating that accused would be relevant under section 9 of the Evidence Ordinance as a fact establishing the identity of a person whose identity is relevant. The evidence of Sergeant Edirisinghe that Don Thomis Gunasekera and Don Windsor each identified the 4th and 5th accused at the parade was, therefore, admissible evidence. But such evidence does not go very far towards showing that the evidence given by Don Thomis Gunasekera and Don Windsor against the 4th and 5th accused at the trial is true even though the defence failed to establish that the identification was brought about in the manner suggested by it. Neither Don Thomis Gunasekera nor Don Windsor was able to give to the Police a description of the robbers which tallied in any way with the 4th and 5th accused. Even with regard to what these accused did at the time of the robbery the evidence of the two witnesses is contradictory. Don Thomis at first said that the 4th accused did not do anything in particular, while the 5th accused went up with a knife upraised towards Don Windsor. According to Don Windsor, the 4th accused struck him a blow with the hand on the back of his shoulder, and the 5th accused tried to stab him. Subsequently Don Thomis, when cross-examined as to whether he had not stated in the Magistrate's Court that the person who tried to stab Don Windsor was the 4th accused, admitted having said so and adopted that evidence as correct.

Apart from evidence relating to the identification of an accused by a witness at an identification parade being relevant under section 9 of the Evidence Ordinance, where the witness's identification amounts to a statement that the person identified is the person who committed the offence in question, and the statement is made before " an authority legally competent to investigate the fact ", such statement would also be relevant under section 157 of the Evidence Ordinance as corroboration of any evidence to the like effect given by the witness at the trial of the person identified. In the present case the identification parade having been held by Sergeant Edirisinghe, the question arises whether he was " an authority legally competent to investigate the fact ", viz.,

the identity of the persons concerned in the commission of the house-breaking and robbery. It is not claimed for Sergeant Edirisinghe that in holding the identification parade he was conducting an investigation under Chapter XII of the Criminal Procedure Code. If he was holding such an investigation, the special provisions of section 122 (3) in Chapter XII would preclude the use, as corroboration under section 157 of the Evidence Ordinance, of any statement made to him by Don Thomis Gunasekera or Don Windsor relating to the identity of the 4th and 5th accused.

Was Sergeant Edirisinghe " an authority legally competent to investigate the fact ", by virtue of the orders given to him by the Magistrate to hold the identification parade ? Assuming that the powers conferred on a Magistrate by the Criminal Procedure Code are wide enough to make him legally competent to investigate the identity of the person or persons concerned in the commission of an offence, by holding an identification parade, such powers cannot be delegated by him to another. It would follow, therefore, that in holding the identification parade Sergeant Edirisinghe was not " an authority legally competent to investigate the fact " and any statements made to him by Don Thomis Gunasekera or Don Windsor at the identification parade that the 4th and 5th accused were two of the robbers who entered their house on the night of the 24th September, 1959, are not admissible under section 157 of the Evidence Ordinance, Hence, any corroboration of the evidence of Don Thomis and Don Windsor at the trial that would have been available had their statements been admissible under section 157 is not forthcoming in this instance. In regard, however, to such statements, even if admissible under section 157, it may be observed that there is ample authority that they are not " corroboration " in the true sense of the term, for " corroboration must be extraneous to the witness who is to be corroborated "—*per* Lord Hewart, C.J., in *Rex* v. *Whitehead*, (1929) 1 K.B.D. 99. See also, the case of *The King* v. *Atukorale*, 50 N.L.R. 256, where it was held that at the trial of an accused charged with rape, the particulars of the complaint made to the police by the prosecutrix shortly after the alleged offence, though admissible under section 157 of the Evidence Ordinance, is not corroboration of her evidence.

For the foregoing reasons we are of the opinion that the verdict of the Jury convicting the 4th and 5th accused (the 2nd and 3rd appellants, respectively) on the evidence of Don Thomis Gunasekera and Don Windsor is unreasonable. The convictions of these appellants are accordingly quashed and they are acquitted.

There remains for consideration the case of the 2nd accused (the 1st appellant). His complicity in the offences of which he was convicted rests on the evidence of Sedera, and not on the evidence of Don Thomis Gunasekera or Don Windsor. Although Sedera was subjected to cross-examination at some length with a view to showing that he had reason to give false evidence against the 2nd accused, nothing tangible was elicited as a result of it. Sedera mentioned the name of the 2nd accused without delay to those, including Aron, who came soon after the robbers left the scene of the crime. Moreover, the 2nd accused was well known to Sedera, and the circumstances in which Sedera says he identified him leave no room to think that this may be a case of mistaken identity.

Submissions were addressed to us by counsel for the 2nd accused, and also by counsel for the 5th accused, that the trial was vitiated by certain irregularities and illegalities connected with the inspection of the scene and other places by the Jury in the presence of the Judge and counsel after all the evidence led for the prosecution and the defence was concluded. The first place inspected was the house of Don Thomis Gunasekera. There the witness, Sedera, was asked to point out where he was sleeping and also where he hid himself. Don Thomis Gunasekera demonstrated the composition of the walls of his house, and pointed out various objects and places in the house already referred to in his evidence. He was questioned about the gap between the two shutters of the rear door when they were closed, some additional locks which he had fitted to the door after the robbery and about the houses in the neighbourhood which had figured in the evidence. He indicated the direction in which each of them stood. The Assistant Superintendent of Police, Mr. Weerasooriya, pointed out the place in the frame of the front door where a shot alleged to have been fired by the robbers had struck, and was also questioned about the condition of the shutters of the rear door at the time when he first arrived at the scene. The photographer, Mr. Jayasuriya, was asked to locate some of the objects shown in the photographs taken by him and produced at the trial, and the various angles from which the photographs were taken.

The next place inspected was the road opposite the Gampaha Police Station. The witness, Arlis Perera, who at the relevant time was the officer-in-charge of the Fiscal's Remand Cell at Gampaha, indicated in which direction along the road the Remand Cell and the Railway Station were situated. At the Remand Cell itself, Arlis Perera was questioned as to what parts of the Magistrate's Court, which is a little further away, could be seen by a person who was in the Remand Cell. At the Magistrate's Court, Don Thomis Gunasekera showed from which side of the Court-house he was brought into the well of the Court where the identification parade was held, and the place upstairs where he and Don Windsor were taken after they had, in turn, identified the 4th and 5th accused at the parade. Each of the witnesses mentioned was questioned on affirmation by the Court, and in some instances by Crown Counsel and Counsel for the accused as well.

The scope of section 238 of the Criminal Procedure Code, which provides for a view by the Jury of the scene of the offence or other material place, was considered by the Privy Council in *The King* v. *Seneviratne*, 38 N.L.R. 208. While certain aspects of the view of the scene which took place in the course of the trial in that case were criticised by Their Lordships, they stated that they had "no desire to limit the proper exercise of discretion or to say that no view by a jury can include an inspection or demonstration of relevant sounds and smells". In the more recent case of *Regina* v. *Arthur Perera*, 57 N.L.R. 313, there was an inspection of the scene at which a police officer demonstrated how it was possible for a person of the height of the accused to have stood outside the window of a bedroom and, by introducing his hand through the grill, have shot the deceased with a pistol while the latter was in a particular part of the room. This Court held that the demonstration was not obnoxious to the provisions of section 238 of the Criminal Procedure Code.

The majority of us can see no legal objection to the Jury having in the present case been shown the various places, objects and matters to which their attention was specially directed in the course of the inspection, as already briefly set out in the preceding paragraphs. The only irregularity of which any notice need be taken is that the questions put to the witnesses and the replies they gave, took the form of evidence recorded at the inspection, instead of the witnesses being recalled in Court after the inspection was concluded and their evidence recorded as to what took place at the inspection, which is the procedure normally adopted. Section 238 of the Criminal Procedure Code does not authorise the recording of evidence at the scene of the offence or other place viewed by the Jury. The majority of us do not consider, however, that the irregularity is such as to vitiate the trial, or that it resulted in material prejudice to the 2nd accused. Most of the evidence recorded at the scene was in respect of matters which had already been deposed to by the witnesses concerned when they gave evidence earlier in Court.

The indictment on which the appellants were tried consisted of six counts. When the Jury returned their verdict finding the appellants guilty on Counts 1 to 4, which had been framed on the basis that there was an unlawful assembly, the Court directed the Jury not to return a verdict on the 5th and 6th counts, which contained charges of house-breaking (section 443) and robbery (section 380), respectively, read with section 32, of the Penal Code. The sentence imposed on Count 3 was five years rigorous imprisonment, to run concurrently with the sentences of six months rigorous imprisonment on Count 1 and two years rigorous imprisonment on Count 2, but consecutively with the sentence of ten years rigorous imprisonment on Count 4, *i.e.*, 15 years, in all. In view of our order acquitting the 2nd and 3rd appellants, it is doubtful whether on the evidence it has been established that the number of persons who took part in the house-breaking and robbery comprised the minimum number of five required to constitute an unlawful assembly.

The verdict finding the 1st appellant (the 2nd accused) guilty on Counts 1 to 4 of the indictment shows that the Jury were satisfied of the following facts :—(*a*) that the 1st appellant was a member of an unlawful assembly the common objects of which were house-breaking and robbery ; and (*b*) that in furtherance of those objects he was present at the scene of the crime, in which he took an active part by tying up the witness, Sedera, while the other members of the assembly entered the house of Don Thomis and committed the offences of house-breaking and robbery. On these facts the 1st appellant would be guilty of the charges laid against him in Counts 5 and 6 of the indictment. Acting under section 6 (2) of the Court of Criminal Appeal Ordinance (Cap. 7), we, therefore, substitute for the verdict of the Jury against the 1st appellant a verdict of guilty

on Counts 5 and 6 and pass a sentence of five years rigorous imprisonment on Count 5, and a sentence of ten years rigorous imprisonment on Count 6, the sentences to run concurrently, that is, fifteen years rigorous imprisonment, in all. But under section 15 (3) of the same Ordinance we direct that the time during which the 1st appellant has been specially treated as an appellant in terms of that section shall count as part of the term of imprisonment under the sentence passed on him.

Convictions of 4th and 5th accused-appellants quashed and that of 2nd accused-appellant varied.

Present : **H. N. G. Fernando, J., and T. S. Fernando, J.**

SUDARMAN SILVA & ANOTHER *vs.* SENAHAMY & OTHERS *

S.C. No. 100 (*F*)/1961—*D.C. Negombo, No.* 171/*L.*

Argued on : 15th May, 1963.
Decided on : 30th October, 1963.

Fideicommissum—Sinhala deed—Use of the words " urumakkara polmakh athmistrassi bharakaradin "—Whether to be translated as " heirs, executors, administrators and assigns "—Meaning to be given to the word " භාරකාර "—Validity of the fideicommissum.

A claim was made that the words in the following clause in a deed (as translated from Sinhala) created a *fideicommissum* :—

" Therefore, we, the said Donors hereby gave full power unto the said Donees, Kalinga Thamis Nona and Dinayadura Abaran Silva, to hold and possess subject to the aforesaid regulations the said undivided portion of land and all the rights, title, interest and privileges of us the said Donors in and to the same, and after their lifetime their heirs, executors, administrators and assigns to hold and possess subject to the Government regulations the same uninterruptedly for ever or to deal with the same as please."

Held : (1) That the words used are not sufficient to create a *fideicommissum.*

(2) That the word " *bharakara* " should not be given its literal meaning, " Trustee, bailee, consignee, custodian, warden " as the Supreme Court had for over fifty years recognised it as equivalent to the English word " assigns " in accordance with a previous notarial practice.

Per H. N. G. Fernando, J.—" The acceptance at the present-day of a different construction would result in the condemnation of titles long regarded as valid and settled. Moreover, the opinion of de Sampayo, J., *related to a notarial practice* which to his knowledge *prevailed during a period prior to* 1914, and there is not, nor is there likely to be, available material on which we can *now* hold that the learned Judge formed an incorrect opinion upon on what was for him a past or a contemporary practice of notaries. It is significant also that the opinion was expressed with full knowledge of the correct meaning of the Sinhala word ".

Followed : *Silva* v. *Silva*, (1914) 18 N.L.R. 174.
Seneviratne v. *Mendis*, (1963) 65 N.L.R. 169.

Not followed : *William Nonis* v. *Simon Nonis and Others*, (1960) LXI C.L.W. 17.

H. W. Jayawardena, Q.C., with *L. C. Seneviratna*, for the appellants.

S. C. E. Rodrigo, for the respondents.

H. N. G. Fernando, J.

It is common ground in this case that one Thamis Nona and her husband, Abaran, became entitled to certain shares in land under deed No. 16450 of 1896 (P3), and that those two persons together with others were by deed of Partition of 1904 (D 2) allotted in respect of their rights " C ", which is the subject of the present action. The plaintiffs who are the children of Thamis Nona and Abaran claim that the deed P 3 of 1896 created a *fideicommissum* and on this basis instituted this action to be declared entitled to a 17/20 share of the land in dispute. The

* For Sinhala translation, see Sinhala section, Vol. 7 part 6, p. 21

defendants claim that same share by virtue of a deed of 12th March, 1904, by which Thamis Nona and Abaran Silva purport to have conveyed the 17/20 share to the predecessor in title of the defendants. The claim that P 3 created a *fideicommissum* has been decided by the learned District Judge in the affirmative and in favour of the plaintiffs.

The translation of the relevant clause of the deed P 3 of 1896 is as follows :—

> " Therefore, we the said Donors hereby gave full power unto the said Donees, Kalinga Thamis Nona and Dinayadura Abaran Silva to hold and possess subject to the aforesaid regulations the said undivided portion of land and all the rights, title, interest and priviledges of us the said Donors in and to the same, and after their life-time their heirs, executors administrators and assigns to hold and possess subject to the Government regulations the same uninterruptedly for ever or to deal with the same as please."

It is unnecessary for me to refer to the numerous decisions of this Court holding that language of this description, that is to say, " Unto the said donees and after their life-time, their heirs, executors, administrators, assigns ", is insufficient to create a *fideicommissum* ; for those decisions are mentioned in the recent judgment of Weerasooria, J., in *Seneviratna* v. *Mendis*, 65 N.L.R. 169. If those decisions are to be followed the plaintiffs' present action must clearly fail.

The learned District Judge, however, has provided his own translation of the Sinhalese original in which in lieu of the phrase, " their heirs, executors, administrators and assigns ", there occurs instead the phrase, " their heirs, executors, administrators and their custodian or trustee ". In accepting this translation the learned Judge has followed the same course as did Basnayake, C.J., in the case of *William Nonis* v. *Simon Nonis and Others*, 61 C.L.W. 17, where the learned Chief Justice gave to the Sinhalese word "භාරකාර" the meaning, " Trustee, bailee, consignee, custodian, warden ". Weerasooria, J., in the recent judgment mentioned above, took the view that the judgment of Basnayake, C.J., should not be followed and it might be helpful for me to state my own reasons for concurring in that view.

The same point as to the true meaning of the Sinhalese word " භාරකාර " was considered in 1914 by De Sampayo, J., in *Silva* v. *Silva*, 18 N.L.R. 174, where the learned Judge made the following observations :—

> " There was some question raised at the argument of the appeal as to the correctness of the translation of the Sinhalese word *bharakaraya* as meaning " assign ". The Sinhalese word, no doubt, literally means custodian or person in charge, as the District Judge says, but in the present context I think it is intended to be the equivalent of " assign ". I may say that notaries, in reproducing in Sinhalese the English conveyancing formula " heirs, executors, administrators and assigns ", generally use the phrase " *urumakkara polmakh athmistrasi bharakaradin* '."

From these observations, it is apparent :—

(*a*) that some fifty years ago a District Judge had held, and this Court accepted, the literal meaning of the Sinhala word to be " custodian or person in charge " ;

(*b*) that, nevertheless, de Sampayo J., presumably acting upon knowledge and experience acquired professionally, pointed out that notaries used the word as an equivalent for the English word " assigns ", and

(*c*) that this Court in the judgement recognized not the literal meaning of the word, but rather the meaning attaching to it according to previous notarial practice.

Prior to the recent decision of my Lord the Chief Justice, there has been no case in which this Court has disagreed with the observations of de Sampayo, J., and it is proper to presume on the contrary that those observations have guided notaries and Judges in advising and deciding upon questions of title arising upon deeds in which the same Sinhala word occurs. Since a judgment of this Court pronouncing upon the construction of particular language in a document has stood unquestioned for so long a period, there is no doubt that transactions must have taken place on the faith of the correctness of the judgment. The acceptance at the present day of a different construction would result in the condemnation of titles long regarded as valid and settled. Moreover, the opinion of de Sampayo, J., *related to a notarial practice* which to his knowledge *prevailed during a period prior to* 1914, and there is not, nor is there likely to be, available material on which we can *now* hold that the learned Judge formed an incorrect opinion upon on what was

for him a past or a contemporary practice of notaries. It is significant also that the opinion was expressed with full knowledge of the correct meaning of the Sinhala word.

For the reasons stated I would hold that the deed P 3 did not create a *fideicommissum*. The appeal is allowed and the plaintiffs' action is dismissed with costs in both Courts.

T.S. FERNANDO, J.
I agree.

Appeal allowed.

Present : **Abeyesundere, J., and Sri Skanda Rajah, J.**

DHARMASENA *vs.* THOMAS & OTHERS

S.C. 69/'61—*D.C. Panadura*, 7076.

Argued and decided on : 30th November, 1962.

Pleadings—Amendment of plaint to include possessory action—Amendment filed after right to said action had been prescribed—Whether amendment bad—Prescription Ordinance, section 4.

Where it was sought to amend a plaint in a *rei vindicatio* action, to include in the alternative, a possessory action at a time when the right to the latter action had been prescribed—

Held : That the amendment should not be allowed.

J. A. L. Cooray with *H. E. P. Cooray* for the 1st defendant-appellant.

No appearance for the plaintiffs-respondents.

ABEYESUNDERE, J.

The plaintiffs instituted this action in the District Court of Panadura against the 1st and 2nd defendants alleging that on 22nd October, 1959, they had unlawfully ousted the plaintiffs from the possession of the land in suit and praying for a declaration of title to that land, for the ejectment of the defendants therefrom, for the restoration of the plaintiffs to the possession thereof, and for damages. The defendants in their answer denied that the plaintiffs were entitled to the relief claimed by them.

On 16th June, 1961, the Proctor for the plaintiffs moved to amend the plaint and tendered an amended plaint. The defendants objected to the proposed amendment of the plaint. On 30th June, 1961, the learned District Judge made order accepting the amended plaint. The 1st defendant has appealed from that order.

The amended plaint was for the purpose of praying for a possessory decree in the alternative. According to the original plaint the plaintiffs were entitled to recover possession of the land in suit on proof of title thereto, but according to the amended plaint they were entitled to recover possession of that land without proof of title if they proved their possession of that land for a year and a day immediately prior to the date of their dispossession. Section 4 of the Prescription Ordinance does not allow a possessory action to be brought after the lapse of one year from the date of dispossession. The motion for the amendment of the plaint to enable the plaintiffs to pray for a possessory decree in the alternative was made when a possessory action in respect of the land in suit was already barred by the provisions of the Prescription Ordinance. The amendment of the plaint should not, therefore, have been allowed.

I set aside the order made by the learned District Judge allowing the amendment of the plaint. The 1st defendant is entitled to the costs of his appeal.

SRI SKANDA RAJAH, J.

I agree.

Appeal allowed.

Present : **Abeyesundere, J.**

APPUWA *vs.* ASST. COMMISSIONER OF AGRARIAN SERVICES, KEGALLE *

S.C. 459/'63—*M.C. Kegalle*, 44842.

Argued and decided on : September 6, 1963.

Paddy Lands Act, No. 1 *of* 1958—*Order for eviction by default—Magistrate's refusal to vacate such order—Appeal to be allowed as default due to illness.*

An order by default for eviction from a paddy land was made by a magistrate against the appellant under section 21 (3) of the Paddy Lands Act, No.1 of 1958. On an application made supported by a medical certificate to vacate the said orde on the ground that the default was due to illness the Magistrate stated that he had no power to do so.

Held : That as the appellant's absence was due to illness, his default should be excused.

U. C. B. Ratnayake, for the respondent-appellant.

N. B. D. S. Wijesekere, Crown Counsel, for the Attorney-General.

ABEYESUNDERE, J.

The appellant was absent on the day he was required by the Magistrate of Kegalle to show cause why he should not be evicted from the paddy land described in the report under section 21 (1) of the Paddy Lands Act, No. 1 of 1958, presented to the Magistrate's Court of Kegalle by the Assistant Commissioner of Agrarian Services of the Kegalle District. The Magistrate made order allowing the application contained in such report for an order of eviction of the appellant from such paddy land.

On a later date the appellant filed an affidavit together with a medical certificate stating that his absence was due to illness and praying that the Court be pleased to vacate the order made in regard to the aforesaid report. The Magistrate stated that he had no power to vacate his order.

As the appellant's absence was due to illness, his default should be excused. I set aside the order made by the Magistrate on February 6, 1963, and direct that the appellant be given a further opportunity to show cause why he should not be evicted from the aforesaid paddy land.

Appeal allowed.

APPLICATION FOR BAIL

Present : **G. P. A. Silva, J.**

THE QUEEN
vs.
HALKE VIDANALAGE DIONIS JAYASUNDERA & ANOTHER **

(2ND MIDLAND CIRCUIT, 1963—KANDY).
S.C. 55/63—*M.C. Anuradhapura*, 31430.

Decided on : 25th November, 1963.

Bail—Application on behalf of two accused—Evidence showing foundation for accused to take revenge on prosecution witnesses—Should bail be granted to one of the accused in a case of conspiracy, though grounds urged against him are not so strong as those against the others.

*For Sinhala translation, see Sinhala section Vol. 7 part 7. p. 25
**For Sinhala translation, see Sinhala section, Vol 7 part 6. p. 24

Held : (1) That in an application for bail on behalf of an accused, the fact that there is some foundation for the apprehension that, if the accused is enlarged on bail, he may attempt to take revenge on the witnesses for the prosecution is good cause against the granting of such application.

(2) That in a case of conspiracy where the part played by each accused is inextricably interwoven with the part played by the rest, bail should not be granted in respect of one of them though some of the grounds urged against the others are not present in his case.

S. Kanagaratnam, for the accused.

T. M. K. U. Seneviratne, Crown Counsel, for the Crown.

G. P. A. Silva, J.

This is an application for bail on behalf of the two accused in this case who are charged with conspiracy to murder a person called Gamaralalage Sootin Perera and with having committed his murder in pursuance of that conspiracy. The application is made under section 31 of the Courts Ordinance and ordinarily, if no special ground was shown by the Crown, I should have been inclined to allow this application. In answer to this application the Crown has submitted an affidavit by Mr. Padiwita, Inspector of Police, Kekirawa, who, in opposing the application, states, presumably in regard to the 1st accused, Jayasundera, among other things :

(1) That the accused may if enlarged on bail abscond and there will be considerable difficulty in re-arresting them.

(2) The deceased had been killed due to previous enmity as he is alleged to have given information to the Police.

(3) There is every possibility as such, if the accused is enlarged on bail, of his committing further serious offences against the relations of the deceased.

(4) That it is possible for the accused to interfere with the witnesses in the above case.

In regard to the first ground that the accused may abscond, there is nothing on the record which could form the basis of such a statement, for the accused have been present in Court on remand right from the beginning of the non-summary inquiry and Crown Counsel states that there is no evidence of any attempt on the part of the accused to abscond during the magisterial proceedings. The second ground, however, appears to me to have some substance. The motive urged by the prosecution in the case itself is that the deceased was got rid of by the accused, at least, the 1st accused, as a result of enmity arising from the deceased giving information to the police concerning the possession of an unlicensed gun by the accused and also the possession of unlicensed liquor. There will, therefore, appear to be some foundation for the apprehension that if the 1st accused is enlarged on bail, he may attempt to take revenge on the witnesses who have given evidence against him in the magistrate's Court and on whose evidence the prosecution relies to prove the case at the Supreme Court trial. I feel that this would be good cause against the granting of bail so far as the 1st accused is concerned.

In regard to the 2nd accused, there is no motive alleged by the Crown as to why he conspired with the 1st accused to cause the death of the deceased. Crown Counsel suggests, however, that he must be considered to be a hired assassin from the evidence of two witnesses who have stated at the magisterial inquiry that some money passed into the hands of the 2nd accused as consideration for causing the death of the deceased. This evidence appears at pages 5 to 6 of the brief. Quite apart from that, this is a case of conspiracy where the part played by each one is inextricably interwoven with the part played by the other and even though some of the grounds urged against the 1st accused are not present in respect of the 2nd accused, I do not feel that the case against the 2nd accused could be divorced from the case against the 1st accused and that bail should be granted in respect of the 2nd accused. The application is, therefore, refused in respect of both accused.

Bail refused.

Present : **Sri Skanda Rajah, J.**

THEIVANAI *vs.* THEIVANIA *

S.C. 789/'63—*M.C. Bandarawela, Case No.* 39306.

Argued and decided on : 21st February, 1964.

Maintenance Ordinance, section 3—*Husband's offer to maintain wife on condition of living with him—Such offer must be " bona fide ".*

Held : (1) That the offer referred to in section 3 of the Maintenance Ordinance must be a *bona fide* offer.

(2) That, therefore, in the present case the applicant was entitled to succeed as it could be inferred from the Magistrate's judgment (although he had not stated so) that the offer was not *bona fide.*

Case referred to : *Sathasivam* v. *Manickaratnam*, LXIV C.L.W. 107.

M. Kanakaratnam, for the respondent-appellant.

K. Kanthasamy, for the applicant-respondent.

SRI SKANDA RAJAH, J.

Mr. Kanakaratnam for the defendant-appellant submits that the defendant's offer to maintain the wife should have been accepted and he refers to section 3 of the Maintenance Ordinance, Cap. 91, which reads : " If such person offers to maintain his wife on condition of her living with him, the Magistrate may consider any grounds of refusal stated by her and may make order under section 2, notwithstanding such offer, if the Magistrate is satisfied that such person is living in adultery, or that he has habitually treated his wife with cruelty ".

The offer referred to in this section must be a bona fide offer. (*Sathasivam* v. *Manickaratnam*, 64 Ceylon Law Weekly, 107).

Although the Magistrate has not stated that it was not a bona fide offer one can infer from his judgment that he did not consider this a bona fide offer, for, the Magistrate says, " The respondent has waited till it was taken up for inquiry and made the invitation for the first time when the case was proceeding ".

Therefore, the applicant was entitled to succeed on the ground that the offer was not bona fide.

I would dismiss the appeal with costs.

Appeal dismissed.

Present : **De Silva, J. and Abeyesundere, J.**

ARUMAITHURAI & OTHERS *vs.* ARUDCHELVANAYAGAM

S.C. 257—*D.C. Point Pedro,* 49/*TR.*

Argued and decided on : 31st October, 1963.

Trusts Ordinance, section 102—*Action withdrawn owing to defect in certificate of Government Agent—Is separate application under section* 102 (3) *necessary before filing fresh action—Whether fresh certificate issued under earlier application sufficient for this purpose.*

In a plaint filed under section 102 (3) of the Trusts Ordinance in respect of a Hindu Temple, the certificate issued by the Government Agent, which was a prerequisite of the action, had a formal defect in that the Government Agent had failed to certify that the Commissioner reported that the subject-matter of the plaint was one that called for the consideration of the Court, and that it had not proved possible to bring about an amicable settlement of the questions involved. The plaintiffs withdrew the action with liberty to file a fresh action on the same cause of action. Thereafter, the plaintiffs, without making a separate application to the Government Agent for a fresh inquiry and a fresh report, filed the present action on the same cause of action with a fresh certificate from the Government Agent which complied with the provisions of the section.

* For Sinhala translation, see Sinhala section Vol. 7, part 7, p. 26

Held : That it was not necessary to make a separate application to the Government Agent with respect to the plaint in the second action, nor was a fresh inquiry or a fresh report necessary, as the cause of action in the first and second action was the same. As the Commissioner had already inquired into the matter and reported to the Government Agent, there had been a compliance with section 102 (3) of the Trusts Ordinance, and the present action was properly constituted.

C. Ranganathan, for plaintiffs-appellants.

S. Sharvananda, for defendant-respondent.

DE SILVA, J.

The plaintiffs filed an action under section 102 of the Trusts Ordinance praying that a scheme of management for a Hindu Temple be settled by Court for vesting the temple and the temporalities on Trustees, that the defendant be ordered to render an account of the income for the last six years, and for damages in Rs. 3,000/-. These same plaintiffs had previously filed an action on the same cause of action in TR 47 of the District Court of Point Pedro. That plaint had been filed on the 13th September, 1958. Before filing that action, these plaintiffs had made an application to the Govt. Agent under sub-section 3 of section 102 setting out the subject-matter of the plaint which they proposed to file. This matter was duly referred by the Govt. Agent to a Comissioner who inquired into that dispute and the Govt. Agent had issued a certificate in terms of the sub-section. However, there was a formal defect in the certificate that the Govt. Agent had issued in that he had failed to certify that the Commissioner had reported that the subject-matter of the plaint was one that called for the consideration of the Court and that it had not proved possible to bring about an amicable settlement of the questions involved. In that certificate, the Govt. Agent himself had certified on these matters. In view of the objection taken to the validity of the certicate the previous action was withdrawn with liberty to file a fresh action on the same cause of action. Thereafter, the present action has been filed with a certificate from the Govt. Agent complying with the provisions of sub-section 3 of section 102 upon the same cause of action, but for the purpose of the present action, no separate application had been made by the plaintiffs to the Govt. Agent nor had any fresh inquiry been held by the Commissioner with respect to that matter.

The question for decision in this appeal is whether on the original petition which the plaintiffs had filed under sub-section 3 and upon the inquiry by the Commissioner and the certificate given by the Govt. Agent the present action could have been filed in terms of sub-section 3 or whether the effect of the earlier application and proceedings were exhausted by the fact that the previous action was filed and was dismissed as stated earlier. The learned District Judge upheld the objection by the defendant and dismissed the plaintiff's action on this preliminary issues which were argued before him.

We, however, are of the view that it was not necessary to make a separate application to the Govt. Agent with respect to each plaint that the plaintiffs proposed to file on the same subject-matter. In this instance, there was a compliance with the provisions of sub-section 3 because an application had been made to the Govt. Agent setting out the subject-matter of the action which the plaintiffs proposed to file. In fact, a copy of the proposed plaint was submitted to him and the plaint in the first action and in the second action were the same. The Commissioner had inquired into that matter and made a report to the Govt. Agent and the Govt. Agent has given the certificate as contemplated in this sub-section. A similar objection, but under section 461 of the Civil Procedure Code was taken in S.C. 649/60 (F), D.C. Trincomalee, 6131, and this Court has held in that case that a separate notice under that Section was not required in respect of every plaint filed upon the same cause of action. The finding in that case will be applicable to a construction of the provisions of sub-section 3 of section 102 of the Trust Ordinance so far as the present objection of the defendant is concerned.

We, therefore, set aside the order made by the learned District Judge upholding the objection of the defendant and dismissing plaintiff's action with costs and send this case back for trial on the remaining issues. Issues 9 and 10 are answered in favour of the plaintiff. The plaintiff is entitled to the costs of the proceedings in the District Court on 25th May, 1961, and costs of this appeal.

ABEYESUNDERE, J.

I agree.

Appeal allowed.

END OF VOLUME LXV

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පිටපත් ලබාගත හැක්කේ නො: 50/3, සිරිපා පාර, හැව්ලොක් ටවුම—කොළඹ 5, යන ස්ථානයෙනි.

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අපරාධ නඩු විධාන සංග්‍රහය

අපරාධ නඩු විධාන සංග්‍රහයේ 151 (2) සහ 187 (1) දරණ ඡෙද—151 (2) ඡෙදයෙහි ඇති "විහාම" යන වචනයෙහි තේරුම—මහේස්ත්‍රාත්-තුමා ඉදිරියට චිත්තිකරුවන් ඉදිරිපත් කරන්නා ගේ සාක්ෂිය සටහන් කිරීම ප්‍රමාදවීම—151 (2) ඡෙදය සමග සම්බන්ධ කොට කියවූ කල එය උල්ලංඝනය වීම—මෙබඳු ප්‍රමාදයකින් ඇති වන ආදීනවය.

තීන්දුව: (1) අපරාධ නඩු විධාන සංග්‍රහයේ 151 (2) ඡෙදයෙන් පැණවී ඇත්තේ චිත්තිකරුවන් ඉදිරිපත් කරන්නාගේ සාක්ෂිය උසාවිය වහාම සටහන් කර ගත යුතු බව ය—එනමුත් චිත්තිකරු-වන් ඉදිරිපත් කරන්නා මහේස්ත්‍රාත් වරයාට තමා එසේ ඉදිරිපත් කරණ බව කියන අවස්ථාවේදීම ය.

(2) චිත්තිකරුවන් ඉදිරිපත් කිරීම සහ එසේ ඉදිරිපත් කරන්නාගෙන් සාක්ෂි විභාග කිරීමත් අතර දවස් හතරක ප්‍රමාදයක් සිදුවී ඇති නිසා ඉන් අනතුරුව ගත් සියලුම පියවර නිෂ්ප්‍රභා කළ යුතුය.

ඇස්. ඉසඩීන් එ. බදුල්ලේ පොලිස් ඉන්ස්පෙක්ටර් 1

ආදයම් බදු ආඥා පණත

ආදයම් බදු ආඥා පණතේ—64 (2) (ඒ), 64 (2) (බී), 65, 68 (1) සහ 80 වන ඡෙද—පිළිවෙලින් වෂී තුනක් ගැන ඇපැල් කරු එවූ ආදයම් රපෝර්තු පිළිගෙන ඒ අනුව තක්සේරු කිරීම—ඉන්පසු ඒ අවුරුදු තුන ගැනම වැරදි ඡෙදයක් යටතේ ක්‍රියා කරණ විලාශයෙන් අතිරේක තක්සේරුවක් කිරීම —මෙසේ කිරීම නිසා 80 වන ඡෙදය යටතේ මහේස්ත්‍රාත්වරයාට දුන් සහතික පත්‍රයක් බල ශූන්‍ය බවට පත්වේ ද යන්න—එබඳු අතිරේක තක්සේරුවකට විරුඬව ඇපැල්කරු විසින් ඇපැල් නොගෙන තිබීම—උපකොමසාරිස්වරයාගේ තක්-සේරු කිරීම නීතිවිරෝධී යයි ඇපැල්කරු විසින් දක්වන ලද විරෝධය ගැන විභාග කොට තීන්දුවක් දීමට මහේස්ත්‍රාත්තුමාට ආඥා බලය තිබේ ද යන්න.

සඩදේශීය ආදයම් බදු පණතේ 80 වන ඡෙදය යටතේ සඩදේශීය ආදයම් උපකොමසාරිස් තැන විසින් මහේස්ත්‍රාත්වරයාට ඉදිරිපත් කළ සහතික පත්‍රයක් අනුව එහි සඳහන් පරිදි ඇපැල් කරු විසින් තමාගෙන් අයකර ගත යුතු ආදයම් බද්ද වශයෙන් රුපියල් 254,745/- ක් නො ගෙවා පැහැර හැරීමට හේතු දක්වන ලෙස දන්වන ලදී.

පරීක්ෂණයකින් පසු 85 වන ඡෙදයට අනුව ඇපැල් කරුට තමා විසින් ගෙවිය යුතු මුදල දඩ ගසන ලදින් එය නො ගෙවුවොත් වැඩ නැතිව හය මාසයක සිරදඬුවමක් ද නියම කරණ ලදී. ඉන් පසු ඇපැල් පෙත්සමක් ඉදිරිපත් කළ ඔහු එම තීරණය පරිශෝධනය කිරීමට ද ආයාචනා කරමින් පෙත්සමක් ඉදිරිපත් කොට තිබේ.

පිළිවෙලින් වෂී තුනක්ම ඇපැල් කරුගේ ආදයම කලින් තක්සේරු කරණ ලද බව පරීක්ෂණයේදී අනාවරණය විය. අර්බුදයට භාජනය වී ඇත්තේ ඒ වෂී තුන පිළිබඳව ඇපැල් කරුගේ ආදයම උපකොමසාරිස්වරයා විසින් අතිරේක ලෙස තක්-සේරු කොට 64 (2) (බී) ඡෙදයට අනුව යයි සැලකෙන හැටියට ඇපැල්කරුට නිවේදනය භාරදීම නීත්‍යානුකූල ද නැද්ද යන්න ය.

තීන්දුව : (1) ආදයම් රපෝර්තුව පිළිගෙන 64 (2) (ඒ) ඡෙදයට අනුව තක්සේරු කර තිබීම නිසා උපකොමසාරිස්වරයා යළින් 64 (2) (බී) ඡෙදයට අනුව ක්‍රියා කරනසේ සැලකෙන හැටියට කටයුතු කර තිබීම වරද සහිතය.

(2) (ඒ) උපකොමසාරිස්වරයා වරද කර ඇත්-තේ තමා කෙරෙහි පැවරී ඇති ආඥා බලයක් ක්‍රියාවෙහි යෙදවීමේ දී නිසා ඒ වරදේ හේතුවෙන් 80 වන ඡෙදය යටතේ දෙන ලද සහතික පත්‍රය නිර්බල තත්ත්වයකට පත් නො කෙරේ.

(බී) එබඳු වරදක් ආඥා පණතේ 68 (1) දරණ ඡෙදයෙහි පිළිසරණින් මග හැරේ.

(සී) තමා පිළිබඳව කරණ ලද තක්සේරුව නිසා ඇපැල් කරු තෘප්තියට පත් නොවූයේ නම් කළ යුතුව තිබුනේ ඒ සඳහා ඇපැල් පෙත්සමක් යැවීම ය.

ඇපැල්කරු විසින් ඉදිරිපත් කරණ ලද විරෝ-ධය විනාශ කර තීන්දුවක් දීමට මහේස්ත්‍රාත්වර-යාට ආඥා බලයක් නැත.

ඇල්. සී. එච්. පීරිස් එ. සඩදේශීය ආදයම් කොම-සාරිස්තැන, කොළඹ 18

ඇප

ඇප දීම—චෝදිතයකු වෙනුවෙන් කරණ ලද ඉල්ලීමක්—චෝදිතයා පැමිණිලි පක්ෂයේ සාක්ෂිකරුවන්ගෙන් පලිගත හැකි බව සටහන්වී ඇති සාක්ෂි වලින් පෙනියාම—කුමන්ත්‍රණය කිරීම පිළිබඳ නඩුවකදී එක් චෝදිතයකුට විරුඬව අනිත් අයට විරුඬව ඇති තරම් උග්‍ර කරුණු ඉදිරිපත්වී නැතත් ඇප දිය යුතු ද?

තීන්දුව : (1) යම් කිසි චෝදිතයකු වෙනුවෙන් කරණ ලද ඇප ඉල්ලීමකදී යම් හෙයකින් එම චෝදිතයා ඇප පිට නිදහස් වුවහොත් සාක්ෂිකරුවන් ගෙන් පලි ගනිය යන සැකය තරමකට හෝ පදනම් කොට ඇති සාක්ෂි ඇතොත් එය එම ඉල්ලීමට ඉඩ නොදීමට සෑහෙන හේතුවකි.

(2) කුමන්ත්‍රණය කිරීම පිළිබඳ නඩුවකදී ඒ නඩුවේ එක් එක් විත්තිකරුවකු විසින් කරණ ලද කටයුතු කොටස අනිත් අය විසින් කරණ ලද කටයුතු කොටස් වලින් තෝරා බේරා වෙන් කර ගත නො හැකි පරිදි එකට වෙලී පැටලී ඇති නිසා, අනිත් අයට විරුඬව මෙහෙය වූ ඇතැම් කරුණු එක් අයකුට විරුඬව නැතිවූවත් ඔහුත් ඒ අනුව ඇප පිට නිදහස් කිරීම නුසුදුසු ය.

මහරැජින එ. දියෝනිස් ජයසුන්දර සහ මෙතියස් පෙරේරා 24

ඉඳුරාණු කම්කරු ආඥා

"ට්‍රිබියුන්" කිරීමේ නඩු" යට බලන්න 3

කාර්මික ආරාවුල් පණත

කාර්මික ආරාවුල් පණතේ 37 වැනි වගන්තිය—එම වගන්තියේ සඳහන් කුමන පියවරකට හෝ අදළ ගාස්තු—අත්‍යය—සහතික නො කරන ලද එහෙත් නඩු වාර්තාවෙන් මතුවී පෙනෙන නීති ප්‍රශ්න—ඒ ගැන කරුණු ගෙනහැර දැක්වීමට ශ්‍රේෂ්ඨාධිකරණය ඉඩදේ ද?

මියගිය කෙනෙකුට විරුඬව කම්කරු උසාවියකට ඉදිරිපත් කරන ලද ඉල්ලීම—එහි බලශූන්‍යතාවය.

තීන්දුව : (1) නඩු වාර්තාවෙහි සඳහන් කරුණු වලින් මතුවී පෙනෙන නීති ප්‍රශ්නයක් සහතික නොකරන ලද්දේ වුවද ඇපෑල ගැන කරුණු ඉදිරිපත් කරන අවස්ථාවේදී තර්ක කිරීමට ශ්‍රේෂ්ඨාධිකරණය අවසර දිය යුතුයි.

(2) කාර්මික ආරාවුල් පණතේ (37 වැනි පරිච්ඡේදය), 37 වැනි වගන්තියේ සඳහන් වන (ඉහත කී) වගන්තිය තේරුම්ගත යුත්තේ එය අතුරු පියවරක් පිළිබඳ ව පමණක් නොව ප්‍රධාන ඉල්ලීම අරභයා නියෝග කෙරෙන අවසාන ගාස්තුව පිළිබඳ ව ද (කම්කරු උසාවියට) අධිකරණ බලයක් ලබා දී ඇති සැටියෙනි.

(3) මියගිය තැනැත්තෙකුට විරුඬව සහනයක් පතා කම්කරු උසාවියකට ඉදිරිපත් කළ ඉල්ලීමක් බලශූන්‍ය ඉල්ලීමකි. ඒ පිළිබඳව (කම්කරු උසාවියේ) සභාපතිවරයා විසින් කරන ලද කුමන නියෝගයක් වුවද අධිකරණ බලයක් නොමැතිව කරන ලද්දකි.

ඕදිරිස් අප්පුහාමි එ. උම්බිච්චි 15

කුඹුරු පණත

කුඹුරු පණත, වර්ෂ 1958, අංක 1—ගොවි ජනසේවා උප කොමසාරිස්වරයෙකු විසින් 3 (2) ඡේදය යටතේ කළ පරීක්ෂණයක්—3 (3) (බී) ඡේදය අනුව කරණ ලද පිටමන් කිරීමේ නියෝගයක්—ඇපැල්කරුට විරුඬව 21 (1) ඡේදය යටතේ ඇපැල්කරුගෙන් කරුණු විමසා පිටමන් කිරීමේ නියෝගයක් යදිමින් වෙන උපකොමසාරිස්වරයකු විසින් මහේස්ත්‍රාත්තුමාට ඉදිරිපත් කරණ ලද වාර්තාවක්—3 (3) (බී) දරණ ඡේදය යටතේ දෙන ලද පිටමන් කිරීමේ නියෝගය නීත්‍යානුකූල යයි මහේස්ත්‍රාත්තුමා සැහීමට පත් කිරීම පිණිස කොමසාරිස්වරයා වෙත පැවරී ඇති යුතුකම—මෙය කළ හැක්කේ කෙසේ ද යන්න—තමා පිටමන් නොකළ යුත්තේ කුමන හේතූන් නිසාද යන්න ඔප්පු කිරීමේ කාර්‍ය්‍ය භාරය ඇපැල්කරු පිට පැවරී තිබීම—මේ කාර්‍ය්‍ය භාරයෙන් ඔහු නිදහස් විය යුත්තේ කෙසේ ද යන්න.

කුඹුරු පණතේ 3 (2) ඡේදය අනුව පවත්වන ලද පරීක්ෂණයකින් පසු එහි 3 (3) (බී) ඡේදයට අනුකූලව නිකුත් කරණ ලද පිටමන් කිරීමේ නියෝගයකින් පසුව පවා කුඹුරෙන් ඉවත් නොවූ ඇපැල්කරු ඉන් පිටමන් කිරීම පිණිස නියෝගයක් යදිමින් 21 (1) ඡේදය යටතේ ගොවි ජනසේවා උප කොමසාරිස්වරයෙකු වන ඉල්ලුම්කරු මහේස්ත්‍රාත්තුමාට වාර්තාවක් ඉදිරිපත් කෙළේය.

මේ සඳහා නිකුත් කරණ ලද සිතාසියට කීකරු වී මහේස්ත්‍රාත්තුමා ඉදිරියට පැමිණි ඇපැල්කරු එසේ තමා පිටමන් කිරීමට විරුඬව කරුණු දක්වා සිටියේ ය. කෙසේ නමුත් උගත් මහේස්ත්‍රාත්තුමා මෙසේ තීන්දු කෙළේය :

(i) පැමිණිලිකරු විසින් ''කුඹුරු පණතට අනුකූලව ගත යුතු සෑම අවශ්‍ය පියවරක්ම ගන්නා ලද බවට තමා තෘප්තියට පත් වූ බව'' ; සහ

(ii) ප්‍රශ්නයට භාජන වී ඇති කුඹුරේ තමාට සිටීමට අයිතියක් ඇති බව ඔප්පු කිරීමට ඇපැල්කරුට නොහැකිවූ බවත් ය.

මෙසේ තීන්දු කළ මහේස්ත්‍රාත්තුමා තමා වෙතින් යාඥ කරණ ලද පිටමන් කිරීමේ නියෝගයක් ද දුන්නේ ය.

මේ සඳහා ඉදිරිපත් කරණ ලද ඇපැලේදී පහත සඳහන් පරිදි තර්ක කරණ ලදී:—

(ඒ) පණතේ 3 (3) (බී) ඡේදයට අනුව කුඹුරෙන් පිටමන් කිරීමට දෙන ලද යථෝක්ත නියෝගය දෙනලද්දේ ඉල්ලුම්කරු විසින් නොව ඔහුට කලින් රාජකාරිය කරණ ලද නිලධාරියා විසින් බව;

(බී) මහේස්ත්‍රාත්වරයා විසින් තමාගේ නියෝගය දීමට කලින් කොමසාරිස්වරයා විසින් 3 (3) (බී) ඡේදය යටතේ දෙන ලද නියෝගය නීත්‍යානුකූල යයි තෘප්තියට පත් විය යුතු බව; සහ

(සී) කොමසාරිස්වරයා විසින් මෙසේ දෙන ලද නියෝගය නීත්‍යානුකූල යයි ඔප්පු කිරීමේ භාරය ඉල්ලුම් කරු පිට පැවරී තිබෙන බව සහ එම නියෝගය 3 (3) (බී) ඡේදය යටතේ කොමසාරිස්වරයා විසින් කිරීමට ආඥ බලය ලැබීම සඳහා අවශ්‍ය ඇතැම් කරුණු ස්ථාපිත කිරීමට ඉල්ලුම්කරුට නොහැකි වී ඇති බවත් ය.

තීන්දුව : (1) පණතේ 21 (1) ඡේදයට අනුව කෙනෙකු පිටමන් කිරීමේ නියෝගයක් දීමට පෙර, එහි 3 (3) (බී) ඡේදය යටතේ උප කොමසාරිස්වරයා කළ නියෝගය කිරීමට ඔහුට ආඥ බලය (Jurisdiction) ලැබී ඇති බව පිළිබඳව මහේස්ත්‍රාත්වරයා සෑහීමකට පත්විය යුතු ය.

(2) තමා පිටමන් නො කිරීමට හේතු දැක්වීමේ කාර්‍ය භාරය ඇපැල්කරු පිට පැවරී ඇති දෙයකි.

(3) ඇපැල්කරු වෙනුවෙන් කෝන්තර ඇසීමේදී අනාවරණය වූ කරුණු වලින් පණතේ 3 (3) (බී) ඡේදයට අනුව කොමසාරිස්වරයාට නීත්‍යානුකූල නියෝගයක් නිකුත් කිරීමට ආඥ බලය පැවරීමට තරම් කරුණු නොමැති බවට ඇපැල්කරු මනා හේතු යුක්තීන් සාක්ෂි සහිතව පෙන්වා ඇති බව සහ ;

(4) එම නිසා ඉල්ලුම්කරු විසින් එකී උප කොමසාරිස්වරයාගේ නියෝගය නීත්‍යානුකූලව කරණ ලදැයි උසාවිය තෘප්තියට පත් කළා යයි පිළිගත නො හැකි බවත් ය.

පී. ලොකුබණ්ඩා එ. නුවර සහකාර ගොවිජනසේවා කොමසාරිස් 5

කුඹුරු පණත, වෂ 1958, නෝ: 1—ඇපැල්කරුගේ නොපැමිණීම නිසා ඔහු කුඹුරින් ඉවත් කිරීමට නියෝගයක්—එම නියෝගය ඉවත් කිරීමට මහේස්ත්‍රාත්තුමාට ඇති බලය—ඇපැල්කරුගේ ප්‍රමාදය අසනිපයට හේතුව හෙයින් ඇපැලට ඉඩදීම.

1958, නෝ: 1 දරණ කුඹුරු පණතේ 21 (3) දරණ ඡේදය යටතේ පැවැත්වූ විභාගයට නියම දිනයෙහි ඇපැල්කරුගේ නොපැමිණීම නිසා හෙතෙම කුඹුරින් ඉවත් කිරීමේ නියෝගයක් මහේස්ත්‍රාත්තුමා විසින් කරණ ලදී. තමාගේ අසනිපය නොපැමිණීමට කරුණු වූයෙන්, මහේස්ත්‍රාත්තුමාගේ නියෝගය ඉවත් කරන මෙන් වෛද්‍ය සහතිකයක් ඇතුලුව ඉදිරිපත් කරණ ලද ඉල්ලීම මහේස්ත්‍රාත්තුමා තමාට එසේ කිරීමට බලයක් නැතැයි කියා එය ප්‍රතික්ෂේප කෙළේය.

තීන්දුව : ඇපැල්කරු නොපැමිණීමට හේතුව ඔහුගේ අසනිපය වූ නිසා, ඔහුගේ නොපැමිණීමට සමාව දිය යුතුයි.

අප්පුවා එ. කැගල්ලේ ගොවිජනසේවා කොමසාරිස්තුමා 25

තුරඟ තරඟ ධාවන ප්‍රසිඛ කිරීම් පාලන පණත

තුරඟ තරඟ ධාවන ප්‍රසිඛ කිරීම් පාලන පණත, වර්ෂ 1961, අංක 44—මෙහි 2.(සී) ඡේදයට අනුව ගෙනා චෝදනාව—ඔප්පු කළ යුතු අංග.

තීන්දුව : (1) වර්ෂ 1961, අංක 44 දරණ තුරඟ තරඟ ධාවන ප්‍රසිඛ කිරීමේ පාලන පණතේ 2 (සී) ඡේදය යටතේ චෝදනාවක් ස්ථාපිත කිරීමට පැමිණිලි පක්ෂය විසින් පහත සඳහන් කරුණු ඔප්පු කිරීම අවශ්‍ය වේ:

(ඒ) විත්තිකරු විසින් මුද්‍රිත ලිපියක් බෙදා හැරිය බව, විකුණූ බව හෝ විකිණීමට ඉදිරිපත් කරණ ලද බව;

(බී) ප්‍රශ්නයට භාජනය වී ඇති මෙම ලිපිය 2 (ඒ) ඡේදය උල්ලංඝනය වන අන්දමින් මුද්‍රණය කළ බව, ප්‍රසිඛ කළ බව හෝ පතුරා හැරිය බව හෝ 2 (බී) ඡේදය බිඳෙන අයුරින් එය මෙරටට ගෙන්වන ලද බව.

(2) 2 (ඒ) දරණ ඡේදය යටතේ ප්‍රසිඛ කිරීමක් හෝ පැතිරවීමක්, ඔහු පොළඹවීමට යොදන ලද අයට විත්තිකරු විසින් විකුණූ බව හැර, බාහිර කරුණක් උපයෝගී කර ගෙන ඔප්පු කළ යුතු ය. නො එසේ නම් විත්තිකරුට විරුඛව චෝදනා ඉදිරි පත් කළ යුතුව තිබුනේ 2 (ඒ) දරණ ඡේදය යටතේ ය.

සලහුද්දීන් එ. කොටුවේ පොලිස් ඉන්ස්පෙක්ටර් ... 2

නඩත්තු පණත

නඩත්තු පණත (91 වෙනි පරිච්ඡේදය) 3 වෙනි ඡේදය—නඩත්තු ඉල්ලන පුරුෂයාට විරුඛව පැවරූ නඩුවක්—බිරිඳව හාරගෙන නඩත්තු කිරීමට පුරුෂයාගේ කැමැත්ත දැක්වීම—එය නිර්‍ව්‍යාජ කැමැත්තක් දැයි කල්පනා කිරීම.

තීන්දුව : නඩත්තු නඩුවක දී පුරුෂයා තම බිරිඳ නඩත්තු කිරීමට භාර ගැනීමට දැක් වූ කැමැත්ත ප්‍රතික්ෂේප කිරීමට කරුණු සැලකූ බව මහේස්ත්‍රාත්තුමාගේ තීන්දු ප්‍රකාශයෙන් පෙනී යන්නේ නම් ඒ ගැන විශේෂයෙන් සඳහන් නොකළත් එම නියෝගය ස්ථිර කිරීමට එය ප්‍රමාණ වේ.

තේඩිවානි එ. තේඩිවානියා 26

පිටමන් කිරීමේ නඩු

ගෙයකින් පිටමන් කිරීම — ඒ සඳහා දැමූ නඩුවක්—වතුයායක රක්ෂාවෙහි නියුක්ත ඉන්දියානු කම්කරුවෝ—කොන්ත්‍රාත්තුව අවසන් වීම—පදිංචිය සඳහා අවකාශ දුන් කාමර ඉන්පසු භාවිතා කිරීමට ඇති අයිතිවාසිකම—එබඳු කාමරයකින් පිටවී යාමට දුන් නිවේදනයේ කාලසීමාවේ ප්‍රමාණය—මේ සඳහා කුමන කාල සීමාවක් සැඟේ ද යන්න.

තීන්දුව : (1) ලංකාවේ තේ හෝ රබර් වතුයායක රක්ෂාවෙහි නියුක්ත වූ නිසාම එහි කුලිකරුවන්ට දෙන එම වතුයායට අයත් ලැයිම් කාමරවල පදිංචිව සිටින කුලිකරුවන්ගේ නීත්‍යානුකූල තත්ඛය අනුව රක්ෂාව අවසන් වූ විට ඔවුන් පිටකළ හැකි වුවද එම කොන්ත්‍රාත්තුවෙන් හැඟී යන කොන්දේසියකින් පෙනීයන්නේ (implied) ඔවුන් ලැයිමෙන් පිට කළ හැක්කේ සාධාරණ කාලසීමාවක් දෙන නිවේදනයකින් පසුව බවකි.

(2) මොවුන් සම්බන්ධව සැලකීමේදී මේ සඳහා තුන්මාසයක කාලසීමාවක් සැඟේ යයි අදහස් කෙරේ.

පොන්නපුල්ලෙ එ. උඩුවර් තේවතු සමාගම ... 3

පිත කොමිසම

පිත කොමිසමක්—සිංහල බසින් ලියවුනු ඔප්පුවක්—''උරුමක්කාර, පොල්මක්, අද්මිනිස්ත්‍රාසි, භාරකාරාදීන්'' යන වචන යොදා තිබීම—''Heirs, executors, administrators and assigns'' කියා ඉංග්‍රීසි බසට පෙරළා තිබීම—''භාරකාරාදීන්'' යන වචනයට දිය යුතු තේරුම—වීද කොමිසමේ නීත්‍යානුකූලතාවය.

ඔප්පුවක සඳහන් වී තිබූ පහත සඳහන් වචන අනුව පිත කොමිසමක් ඇතිවී තිබේ යයි අයිතිවාසිකමක් ඉදිරිපත් වී තිබින :—

''එම නිසා, මෙම ඉඩම දෙන අය වන අපි වන කාලිංග තේමිස් නෝනා සහ දිනයාදුරේ අබරං සිල්වා වන අයට එම ඉඩමෙන් නොබෙදූ කොටසක් ද ඉහත සඳහන් රෙගුලාසි වලට යටත්ව ඔවුන් වෙත තබා ගැනීමට සහ භුක්ති විඳීමට අප වෙත ඇති සියළුම අයිතිවාසිකම් ද හිමිකම් ද, සම්බන්ධකම් ද සම්පූර්ණ බලය

ඇතිව මෙයින් පවරා දෙන අතර ඔවුන්ගේ ජීවිත කාලයෙන් පසු ඒ සියල්ල ඔවුන්ගේ උරුමක්කාර, පොල්මක්කාර, අද්මිනිස්ත්‍රාසි, හාරකාරාදීන්ට අයිතිව ආණ්ඩුවේ රෙගුලාසි වලට යටත්ව එම ඉඩම කිසිම බාධකයක් නැතිව සදකල් ඔවුන් ළඟ තබා ගැනීමට හා භුක්ති විඳීමට බලය ලැබෙන ලෙස ද ඔවුන්ට අභිමත අයුරින් එම ඉඩම ගැන ක්‍රියා මාර්ගයක් ගත හැකි ලෙස ද මෙයින් ලියා පවරා දෙන්නෙමු.''

තීන්දුව : (1) යොදු ඇති එම වචන පිත කොමිසමක් ඇති කිරීමට ප්‍රමාණවත් නොවේ.

(2) ''භාරකාර'' යන වචනයට එහි සාමාන්‍ය තේරුම වන "Trustee, bailor, consignee, custodian, warden'' යන වචන වලට දෙන සිංහල තේරුම යෙදිය නො හැක. එයට හේතුව අවුරුදු 50 ක් පමණ කාලයක් තුල ශ්‍රේෂ්ඨාධිකරණය එම වචනයේ තේරුම ඉංග්‍රීසි භාෂාවේ "assigns'' යන වචනයට සමාන තේරුමක් වන ''ලියා අත්සන්කර පවරා දෙන්නා'' යන තේරුම නොතාරිස් වරුන්ගේ ව්‍යවහාරයක් ලෙස බව පිළිගෙන තිබීම වේ.

ගරු එව්. ඇන්. ජී. ප්‍රනාන්දු විනිශ්චයකාරතුමා :—''එම නිසා වර්තමානයෙහි අද වැනි දිනක මේ පිළිබඳව මෙයට වෙනස් යෙදීමක් හෝ අර්ථකථනයක් පිළිගත හොත් විරකාලයක සිට නීත්‍යානුකූල යැයි ද තීරණාත්මක යැයි ද පිළිගත් බොහෝ අයිතිවාසිකම් පරිහාසයට ලක්වනු ඇත. තවද සම්පායෝ විනිශ්චයකාරතුමාගේ මතය අනුව එහි සඳහන් කෙරෙන නොතාරිස්වරුන්ගේ ව්‍යත්තිය සම්ප්‍රදය ස්ථාපිත වී තිබෙන්නට ඇත්තේ වර්ෂ 1914 ත් ඉහත බොහෝ කාලයක සිට ය. එපමණක් ද නොව ඒ කාලයේදී එම විනිශ්චයකාරතුමාටත් අතීතයේ සිට කෙරිගෙන ආ ව්‍යත්තිය සම්ප්‍රදයක් ලෙස ඒත්තුගිය කරුණක් පිළිබඳ එතුමාට නිරවද්‍ය හැඟීමක් ඇති නොවී යයි සිතීමට අප ඉදිරියේ කිසිම කරුණක් නොමැතිවා පමණක් නොව මතුවට ද ඇති වේ යයි නොසිතිය හැක. මෙම සිංහල වචනයෙහි නියම තේරුම පිළිබඳව සම්පූර්ණ දැනීමක් ඇතිව මෙම මතය පළ කරන ලද බව ඉදුරාම පැහැදිලි ය''.

සුධම්න් සිල්වා සහ තව කෙනෙක් එ. සේනහාමි සහ තවත් අය 21

බෙදුම් නඩු

''සාක්ෂි ආඥා පණත'' යට බලන්න 13

විනිමය පත්‍ර ආඥා පණත

වැක්පතක්—මුදල් නො ගෙවීම නිසා ආපසු හැරී ඒම—ආපසු හැරී ආ බව දන්වීමට නො හැකිවීම—විනිමය පත්‍ර (Bills of Exchange) ආඥා පණතේ 48, 49 වන ඡේද, නීතිව්‍යවස්ථා ග්‍රන්ථ (82 වන පරිච්ඡේදය).

දෙවන විත්තිකරු විසින් ලියනු ලැබ පළමුවන විත්තිකරු විසින් අත්සනින් අනුමත කොට පවරා දෙන ලද (endorsed) වැක්පතක් වර්ෂ 1960 දෙසැම්බර් මස 6 වන දින ආපසු හැරී ආවේ ය. මෙම වැක්පත ආපසු හැරී ආබව පැමිණිලිකාරියට එදම දන්වන ලද නමුත් ඈ එය එසේ හැරී ආ බව වර්ෂ 1961 ජනවාරි 11 වන දින වීන තුරු පළමුවන විත්තිකරුට නිවේදනය නො කළාය. පැමිණිලිකාරිය සහ පළමුවන විත්තිකරු යන දෙදෙනා ම වාසය කළේ එකම නගරයේ ය.

තීන්දුව : විනිමය පත්‍ර ආඥා පණතේ 49 (12) (ඒ) ඡේදය අනුව පැමිණිලිකාරිය විසින් විශේෂ කරුණු ඔප්පු කර නොමැති බැවින් පළමුවෙනි විත්තිකාරියට වර්ෂ 1960 දෙසැම්බර් මස 7 වෙනි දින ලැබෙන පරිදි වැක්පත ආපසු හැරී ආ බව නිවේදනය කළ යුතුව හෝ නිවේදනයක් යැවිය යුතුව හෝ තිබේ. පැමිණිලිකාරිය විසින් මෙසේ නොකරණ ලද නිසා පළමුවන විත්තිකරුට යථා පරිදි නිවේදනයක් ලැබී නොතිබීමේ හේතුවෙන් පැමිණිලිකාරිය විසින් පළමුවන විත්තිකරුට විරුඬව දැමූ නඩුව නිෂ්ප්‍රභා කළ යුතු ය.

කුලසූරිය එ. ලිසිනෝනා පෙරේරා සහ තවත් අය 17

සාක්ෂි ආඥා පණත

සාක්ෂි ආඥා පණතේ, ඡේද 68, 69—බෙදුම් නඩු පණතේ ඡේද 69—බෙදුම් නඩුවක්—අයිතිය සනාථ කිරීමට ඉදිරිපත් කරන ලද ඔප්පුව හොර එකකැයි චෝදනා කිරීම—සහතික කළ සාක්ෂිකරුවන් සහ නොතාරිස් මිය යෑම—එවැනි ඔප්පුවක් සනාථ කළ හැක්කේ කෙසේ ද?

සුදුසු සාධක නැතිව ඔප්පුව සාක්ෂි ලෙස ඇතුලත් කිරීම—නිව්‍යාජ භාවය ගැන දෙස් දක්වා තිබියදී ඉදිරිපත් කිරීමට විරුද්ධතාවය ප්‍රකාශ නොකිරීම— එවැනි සාක්ෂි අනුව උසාවියට ක්‍රියා කළ හැකි ද?

තීන්දුව: (1) මේ නඩුවට අදාළ ඔප්පුවේ නිව්‍යාජ භාවය ගැන දෙස් දක්වා ඇති හෙයින් සාක්ෂි ආඥා පණතේ නියම කර ඇති අන්දමට එය සනාථ කළ යුතුව තිබුන බව. සහතික කළ සාක්ෂිකරුවන් දෙදෙනාම මිය ගොස් ඇති හෙයින් අඩු ගණනේ එක සාක්ෂිකරුවකුගේ සහතිකය ඔහුගේ අත් අකුරින් බව සහ ඔප්පුව ලියා අත්සන් කර දුන් තැනැත්තාගේ අත්සන ඔහුගේ අත් අකුරින් බව ඔප්පු කිරීමට සාක්ෂි ඉදිරිපත් කළ යුතුව තිබුන බව.

(2) ඔප්පුවක නිව්‍යාජ භාවය ගැන දෙස් පවරා තිබෙන අවස්ථාවක හෝ ඔප්පුවක් සනාථ කළ යුතු යයි උසාවිය නියෝග කළ අවස්ථාවක හෝ බෙදුම් නඩු පණතේ 69 වැනි ඡේදය බල නොපාන බව.

(3) සාක්ෂිකරුවෙකු විසින් පළමුවෙන් ම ඔප්පුවේ ඇතුලත් දේ ගැන සඳහන් කළ අවස්ථාවේදී ඒ ගැන විරෝධතාවය එදිරි පක්ෂයෙන් ප්‍රකාශ නොකළ නමුත් එම ඔප්පුව සාක්ෂි වශයෙන් ඇතුලත් කර ඒ අනුව උසාවිය ක්‍රියා කළ යුතු නොතිබුන බව. සාක්ෂි ආඥා පණතේ නියම කර ඇති අන්දමට ඔප්පුවී නැති කරුණු අනුව උසාවියට ක්‍රියා කළ නොහැකි බව.

සාක්ෂිය—සටහන් පොතේ මූලික සටහනක් හෝ සෝදිසි වරෙන්තුවක් හෝ නැතිව පොලිස් නිලධාරියෙකු විසින් වැටලීමක් මෙහෙයවීම—එවැනි පොලිස් නිලධාරියෙකුගේ සාක්ෂිය ඇතුල් කළ හැකි බව—විත්තියේ සාක්ෂිකරුගේ සාක්ෂිය මහේස්ත්‍රාත්වරයා විසින් ප්‍රතික්ෂේප කිරීම—එසේ කිරීමට ප්‍රථමයෙන් සලකා බැලිය යුතු කරුණු—තුරහ තරහ ආඥා පණත, 3 වෙනි ඡේදය යටතේ චෝදනාවක්.

තීන්දුව: (1) තමාගේ සටහන් පොතේ මූලික සටහනක් වත් නොකර සෝදිසි වරෙන්තුවක් ද ලබා නො ගෙන පොලිස් නිලධාරියෙකු විසින් වැටලීමක් කළ විට එම නිලධාරියාගේ සාක්ෂිය ඇතුලත් කළ හැකි නමුත් එම සාක්ෂිය ඉතා ප්‍රවේශමෙන් සලකා බැලිය යුතු ය.

(2) සාක්ෂිකරුවෙකුගේ සාක්ෂිය මහේස්ත්‍රාත්වරයෙකු විසින් ප්‍රතික්ෂේප කිරීමට ප්‍රථමයෙන් හරස් ප්‍රශ්න ඇසීමෙන් හෝ වෙන යම් අඳුමකින් හෝ හෙළි වන කරුණු සහ සාක්ෂිකරුගේ ලීලාව පිළිබඳ ප්‍රශ්න සලකා බැලිය යුතු ය.

වතු කම්කරු (ඉන්දියානු) ආඥා පණත

වතු කම්කරු ආඥා පණත (133 වෙනි පරිච්ඡේදය)— ඉන්දියාවේ සිට ලංකාවට පැමිණි අයගෙන් පැවතෙන ලංකාව නිජභූමිය කොට ඇති තැනැත්තන්ට එම ආඥා පණත බලපවත්වන්නේ ද?—තමා විසින් වැඩ නතර කරණ ලද සේවක සේවිකාවන්ගේ අඹු සැමියන්ගේ වැඩත් යම් කිසි වතු නායක අධ්‍යක්ෂවරයෙකුට නීත්‍යානුකූලව නතර කළ හැකි ද?

ගරු හේරත් විනිශ්චයකාරතුමා ඉදිරිපිට

ඇස්. ඉසදීන් එ. බදුල්ලේ පොලිස් ඉන්ස්පෙක්ටර්*

ශ්‍රේෂ්ඨාධිකරණයේ අංකය: 440/63—බදුල්ලේ මහේස්ත්‍රාත් උසාවිය, අංකය: 32601.

විවාදකොට නිඟු කළ දිනය: වෂී 1963 ඔක්තෝම්බර 1 දින.

අපරාධ නඩු විධාන සංග්‍රහයේ 151 (2) සහ 187 (1) දරණ ඡේද—151 (2) ඡේදයෙහි ඇති ''වහාම'' යන වචනයෙහි තේරුම—මහේස්ත්‍රාත්තුමා ඉදිරියට චිත්තිකරුවන් ඉදිරිපත් කරන්නාගේ සාක්ෂිය සටහන් කිරීම ප්‍රමාදවීම—151 (2) ඡේදය 187 (1) ඡේදය සමග සම්බන්ධ කොට කියවූ කල එය උල්ලංඝනය වීම—මෙබඳු ප්‍රමාදයකින් ඇති වන ආදීනවය.

නිඟුව:— (1) අපරාධ නඩු විධාන සංග්‍රහයේ 151 (2) ඡේදයෙන් පැණවී ඇත්තේ චිත්තිකරුවන් ඉදිරිපත් කරන්නාගේ සාක්ෂිය උසාවිය වහාම සටහන් කරගත යුතු බවය—එනම් චිත්තිකරුවන් ඉදිරිපත් කරන්නා මහේස්ත්‍රාත් වරයාට තමා එසේ ඉදිරිපත් කරණ බව කියන අවස්ථාවේදීමය.

(2) චිත්තිකරුවන් ඉදිරිපත් කිරීම සහ එසේ ඉදිරිපත් කරන්නාගෙන් සාක්ෂි විභාග කිරීමත් අතර දවස් හතරක ප්‍රමාදයක් සිදුවී ඇති නිසා ඉන් අනතුරුව ගත් සියලුම පියවර නිෂ්ප්‍රභා කළ යුතු ය.

නීතිඥවරු:— නිමල් සේනානායක මහතා, චිත්තිකාර-ඇපැල්කරු වෙනුවෙන්.
ඇන්. බී. ඩී. ඇස්. විජේසේකර මහතා, රජයේ අධිනීතිඥ, ඇටෝර්නි-ජනරාල්තුමා වෙනුවෙන්.

ගරු හේරත් විනිශ්චයකාරතුමා:

මෙම නඩුවෙහි ඇපැල්කරු රාජපක්ෂ පොලිස් සරයන් තැන විසින් අපරාධ නඩුවිධාන සංග්‍රහයේ 148 (1) (ඩී) ඡේදය අනුව 1961 ඔක්තෝම්බර් මස 6 වන දින උගත් මහේස්ත්‍රාත්තුමා වෙත ඉදිරිපත් කරනු ලැබ උගත් මහේස්ත්‍රාත්තුමා ඔහු ඇප පිට නිදහස් කොට ඉන්පසු 1961 ඔක්තෝම්බර් 10 වන දින පොලිස් සරයන් රාජපක්ෂ මහතාගේ සාක්ෂිය සටහන් කොට චිත්තිකරුට විරුඬව චෝදනා ඉදිරිපත් කිරීමට පියවර ගත් බව කියමින් නිමල් සේනානායක මහතා තර්ක කරයි.

මෙහිදී සේනානායක මහතා සැලකර සිටින්නේ අපරාධ නඩුවිධාන සංග්‍රහයේ 151 (2) දරණ ඡේදයට අනුව චිත්තිකරු උසාවියට ඉදිරිපත් කරන්නාගේ සාක්ෂිය වහාම සටහන් කළ යුතු බව ය. ''වහාම'' යන්නෙන් අදහස් කරන්නේ ''චිත්තිකරු ඉදිරිපත් කරනු ලබන තැනැත්තා විසින් නියම වශයෙන් තමා ඔහු ඉදිරිපත් කරන බව උසාවියේ ප්‍රකාශ කරන අවස්ථාවේම'' බව නිමල් සේනානායක මහතා වැඩිදුරටත් තර්ක කරයි. ''වහාම'' යන වචනයට මෙසේ අර්ථකථනය කිරීමට ඇති හේතුව මහේස්ත්‍රාත්වරයාට තමා චිත්තිකරු කළැයි කියන චෝදනාව අවබෝධ කිරීම අවශ්‍ය වීම බව කියන අධිනීතිඥවරයා එම චෝදනාවට අදළ කරුණු මහේස්ත්‍රාත්තුමා විමසා ඒ නියායෙන් චිත්තිකරු විසින් එම දඬුවම් ලැබිය යුතු වරද කරන ලද ද යන්න සළකා බලා අනවශ්‍ය ලෙස සිරභාරයේ තැබීම හෝ ඇප නියම කිරීම නොකිරීමට මෙය ඉවහල් වන නිසා යයි කරුණු දක්වා සිටී.

මෙය හේතුසහගත අර්ථකථනයකැයි මම කල්පනා කරමි. චිත්තිකරු උසාවියට ඉදිරිපත් කිරීමත් ඔහු ඉදිරිපත් කළ තැනැත්තාගෙන් සාක්ෂි සටහන් කර ගැනීමත් අතර දවස් 4 ක ප්‍රමාදයක් මේ නඩුවේදී සිදුවී ඇති බව පෙනේ. එම නිසා 151 (2) ඡේදය මෙහිදී උල්ලංඝනය වී තිබේ. මෙබඳු උල්ලංඝනය වීමක් එම අපරාධ නඩුවිධාන සංග්‍රහයෙහි ම 187 (1) ඡේදය සමග එකට කියවූ කල එම නඩුවේදී ඊට ඉසුව ගත් සියළු පියවර නිෂ්ප්‍රභා වන බව සලකා ගත හැක.

එබැවින් මෙහි ගෙන ඇති සියළු පියවර ද චිත්තිකරු වරදට පත් කිරීම ද ඔහුට දුන් දඬුවම ද මම නිෂ්ප්‍රභා කොට වෙන මහේස්ත්‍රාත්වරයෙකු ඉදිරිපිට අපරාධ නඩු විධාන සංග්‍රහයේ 151 වන ඡේදයට අනුකූලව නැවත වරක් අළුතින් ගත යුතු පියවර ගැනීම සඳහා නඩුව ආපසු යවමි.

නිෂ්ප්‍රභාකර ආපසු යවන ලදී.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 65 වෙනි කා., 18 වෙනි පිට බලනු.

ගරු ඇල්. බී. ද සිල්වා විනිශ්චයකාරතුමා ඉදිරිපිට

සලහුද්දීන් එ. කොටුවේ පොලිස් ඉන්ස්පෙක්ටර්*

ශ්‍රේෂ්ඨාධිකරණයේ නෝ: 195/63—කොළඹ ඒකාබද්ධ මහේස්ත්‍රාත් උසාවිය, නඩු නෝ: 25359.

වාදකොට තීන්දු කළ දිනය: 1963 මැයි 22 දින.

තුරහ තරහ ධාවන ප්‍රසිඩ කිරීම් පාලන පණත, වෂ 1961, අංක 44—මෙහි 2 (සි) ඡේදයට අනුව ගෙනා චෝදනාව—ඔප්පු කළ යුතු අංග.

තීන්දුව:— (1) වෂ 1961, අංක 44 දරණ තුරහ තරහ ධාවන ප්‍රසිඩ කිරීමේ පාලන පණතේ 2 (සි) ඡේදය යටතේ චෝදනාවක් සථාපිත කිරීමට පැමිණිලි පක්ෂය විසින් පහත සඳහන් කරුණු ඔප්පු කිරීම අවශ්‍ය වේ:

(ඒ) විත්තිකරු විසින් මුද්‍රිත ලිපියක් බෙදා හැරිය බව, විකුණූ බව හෝ විකිණීමට ඉදිරිපත් කරණ ලද බව.

(බී) ප්‍රශ්නයට භාජනය වී ඇති මෙම ලිපිය 2 (ඒ) ඡේදය උල්ලංඝනය වන අන්දමින් මුද්‍රණය කළ බව, ප්‍රසිඩ කළ බව හෝ පතුරා හැරිය බව හෝ 2 (බී) ඡේදය බිඳෙන අයුරින් එය මෙරටට ගෙන්වන ලද බව.

(2) 2 (ඒ) දරණ ඡේදය යටතේ ප්‍රසිඩ කිරීමක් හෝ පැතිරවීමක් ඔහු පොළඹවීමට යොදන ලද අයට විත්තිකරු විසින් විකුණූ බව හැර, බාහිර කරුණක් උපයෝගී කරගෙන ඔප්පු කළ යුතු ය. නො එසේ නම් විත්තිකරුට විරුඬව චෝදනා ඉදිරි පත් කළ යුතුව තිබුනේ 2 (ඒ) දරණ ඡේදය යටතේ ය.

නීතිඥවරු:— පී. නාගේන්ද්‍රන් මහතා, විත්තිකරු-ඇපැල්කරු වෙනුවෙන්.
ඩබ්ලිව්. කේ. ප්‍රේමරත්න මහතා, රජයේ අධිනීතිඥ, ඇටෝර්නි-ජනරාල්තුමා වෙනුවෙන්.

ගරු ඇල්. බී. ද සිල්වා විනිශ්චයකාරතුමා:

මෙම නඩුවෙහි තුරහ තරහ ප්‍රවෘත්ති මුද්‍රණය කරන ලද මුද්‍රිත ලිපියක් විකිණීමේ හේතුවෙන් තුරහ ධාවනය පිළිබඳ ප්‍රවෘත්ති විකුණන ලදයි විත්තිකරුට විරුඬව නඩු පවරා තිබේ. එංගලන්තයේ නිව්බරි නගරයෙහි සිදුවූ මෙම තුරහ ධාවනය ලංකාවෙන් පිට රටක කරන ලද්දකි. මෙය වෂ 1961, අංක 44 දරණ තුරහ තරහ ධාවන ප්‍රසිඩ කිරීම් පාලන පණතේ 2 (සි) දරණ ඡේදය උල්ලංඝනය කිරීම නිසා එම පණතේ 7 වන ඡේදයෙන් දඬුවම් ලැබිය යුතු වරදකි. 2 (සි) දරණ ඡේදය යටතේ චෝදනාවක් සථාපිත කිරීමට පැමිණිලි පක්ෂය විසින් විත්තිකරු මුද්‍රිත ලිපියක් බෙදහරින ලද බව හෝ විකුණූ බව හෝ විකිණීම සඳහා ඉදිරිපත් කළ යුතු බව හෝ ඔප්පු කළ යුතුය. මේ නඩුවේදී පැමිණිලි පක්ෂය විත්තිකරු විසින් මුද්‍රිත ලිපියක් විකුණූ බව ඔප්පු කරන ලද හැටියට මම සළකා ගන්නෙමි. දෙවැනි ව පැමිණිලි පක්ෂය විසින් එම මුද්‍රිත ලිපිය මුද්‍රණය කරන ලද බවත් එය ප්‍රසිඩ කරන ලද බව හෝ 2 (ඒ) ඡේදය උල්ලංඝනය කරන අන්දමින් එය පතුරා හැරිය බව හෝ 2 (බී) දරණ ඡේදය උල්ලංඝනය කරන අයුරු විදෙසෙකින් මෙ දෙසට ගෙන්වා ගත් බව හෝ ඔප්පු කළ යුතු ය. නමුත් මෙහි විත්තිකරු විසින් එම මුද්‍රිත ලිපිය තමා පොළඹ වීමට පොලිසිය විසින් එවන ලද තැනැත්තාට විකුණූ බව කියන සාක්ෂිය විනා මෙම වරද තහවුරු කිරීමට උවමනා කරන දෙවෙනි අඬගය, එනම් එම මුද්‍රිත ලිපිය මුද්‍රණය කරන ලද බව

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 65 වෙනි කා., 19 වෙනි පිට බලනු.

හෝ ප්‍රසිඩ කරන ලද බව හෝ ලංකාවෙහි පතුරුවා හරින ලද බව හෝ 2 (ඒ) ඡේදය උල්ලංඝනය වන අයුරින් සිදුවූ බව කියා හෝ 2 (බී) දරණ ඡේදය උල්ලංඝනය වන අයුරින් එය විදෙසෙකින් මෙදෙසට ගෙන්වූ බව කියා හෝ සාක්ෂි ඔප්පු කර නැත. එබැවින් විත්තිකරු විසින් තමා පොළඹවීමට පැමිණි තැනැත්තාට මෙය විකිණීම පමණක් ම එය 2 (ඒ) දරණ ඡේදය යටතේ ප්‍රසිඩ කරන ලද බවට හෝ පතුරා හරින ලද බවට සාධකයක් ලෙස පිළිගත නොහේ. එබඳු ප්‍රසිඩ කිරීමක් හෝ පතුරා හැරීමක් හෝ එය විකිණීමෙන් හෝ එය බෙදා හැරීමෙන් පිටස්තරව ඔප්පු කළ යුතු ය. එසේ වූ කල පමණක් 2 (සී) ඡේදය අනුව චෝදනාවක් විත්තිකරුට විරුඬව තහවුරු වේ. එසේ නොමැති නම් ඔහුට විරුඬව චෝදනා ඉදිරිපත් කළ යුතුව තිබුණේ 2 (ඒ) දරණ ඡේදය යටතේ ය. මේ හේතුව නිසා පැමිණිලි පක්ෂයට තම චෝදනාව ඔප්පු කිරීමට නොහැකි වූ බව මම තීරණය කරමි. මෙම ඇපෑලේදී එම චෝදනා චිත්ව භාවයේ (duplicity) හේතුවෙන් ද නිෂ්ප්‍රභාවේයයි කරුණු ගෙනහැර දක්වන ලදී. මෙයට හේතුව විත්තිකරු විසින් මෙම වරද කිරීමෙහිදී උල්ලංඝනය කරන ලද්දේ අංක 2 දරණ ඡේදයෙහි (ඒ) දරණ කොටස ද, (බී) දරණ කොටස ද කියා සඳහන් නොවීම ය. මෙම නඩුවෙහිදී මෙසේ පැමිණිලි කිරීම ද යුක්තිසහගත ලෙස පෙනේ. එහෙත් මේ ඇපෑලේදී ඒ කරුණ ගැන සලකා බැලීම අවශ්‍යයයි නොසිතේ. ඉදිරිපත් කරන ලද ඇපෑලට ඉඩදී විත්තිකරු මෙයින් නිදහස් කෙරේ. විත්තිකරුට ගසන ලද දඩය ද එසේම නිෂ්ප්‍රභා වේ.

ඇපෑලට ඉඩ දෙන ලදී.

ගරු හේරත් විනිශ්චයකාරතුමා ඉදිරිපිට.

පොන්නපුල්ලෙ එ. උඩුවර් තේවතු සමාගම*

ශ්‍රේෂ්ඨාධිකරණයේ අංකය 136/61—බදුල්ල රික්වෙස්ට් උසාවියේ නොම්මරය 15887.

විවාද කොට තීන්දු කළ දිනය : පෙබරවාරි 14, 1963.

ගෙයකින් පිටමන් කිරීම—ඒ සඳහා දැමූ නඩුවක්—වතුයායක රක්ෂාවෙහි නියුක්ත ඉන්දියානු කම්කරුවෝ—කොන්ත්‍රාත්තුව අවසන් වීම—පදිංචිය සඳහා අවකාශ දුන් කාමර ඉන්පසු භාවිතා කිරීමට ඇති අයිතිවාසිකම—එබඳු කාමරයකින් පිටවී යාමට දුන් නිවේදනයේ කාලසීමාවේ ප්‍රමාණය—මේ සඳහා කුමන කාල සීමාවක් සෑහේ ද යන්න.

තීන්දුව: —(1) ලංකාවේ තේ හෝ රබර් වතුයායක රක්ෂාවෙහි නියුක්ත වූ නිසාම එහි කුලිකරුවන්ට දෙන එම වතුයායට අයත් ලැයිම් කාමරවල පදිංචිව සිටින කුලිකරුවන්ගේ නිත්‍යානුකූල තත්ඛය අනුව රක්ෂාව අවසන්වූ විට ඔවුන් පිටකළ හැකිවුවද එම කොන්ත්‍රාත්තුවෙන් හැඟී යන කොන්දේසියකින් පෙනියන්නේ (implied) ඔවුන් ලැයිමෙන් පිට කළ හැක්කේ සාධාරණ කාලසීමාවක් දෙන නිවේදනයකින් පසුව බවකි.

(2) මොවුන් සම්බන්ධව සැලකීමේදී මේ සඳහා තුන්මාසයක කාලසීමාවක් සෑහේ යයි අදහස් කෙරේ.

නීතිඥවරු:— ඇම්. ඇම්. කුමාරකුලසිංහම් මහතා, විත්තිකාර-ඇපැල්කරු වෙනුවෙන්.
ජී. ටී. සමරවික්‍රම මහතා සමග ආර්. ඒ. කන්නන්ගර මහතා, පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංගයෙහි 65 වෙනි කා., 20 වෙනි පිට බලනු.

ගරු හේරත් විනිශ්චයකාරතුමා :

පැමිණිලිකාර – වගඋත්තරකරුට අයත් උඩුවර් වතුයායේ (Udoowerre Estate) වැඩ කරන කම්කරුවෙක් මෙම නඩුවෙහි ඇපැල්කාරි වේ. ප්‍රධාන වශයෙන් තේවතුවල සහ රබර්වතුවල ඉන්දියානු කම්කරුවන් හැටියට කම්කරුවන්ගේ ගණයට ඈ අයත් නැනැත්තියකි. ඇගේ වැඩ නතර කළ බව මෙහි දී පිළිගත යුතු අතර එම වැඩ නතර කිරීමට හේතු වූ කරුණු ගැන ද මෙහි කිසිදු තර්කයක් නැති නිසාත් එම කරුණු මෙම ඇපැලෙහි තීරණයට අදළ නොවන නිසාත් මෙහි බහාලීම අනවශ්‍ය. ඇපැල්කාරිය මෙම වතුයායේ වැඩ කරන්නියක් නිසා වතුයායට ම අයත් ලැයිම් පේළියේ නො. 3 දරණ කාමරය ඇගේ පදිංචිය සඳහා දෙන ලදී. වතුයායේ වැඩ කරන්නියක් ලෙස සිටි ඇයගේ වැඩ නතර කිරීමේ හේතුවෙන් මෙම නඩුවේ පැමිණිලිකාර-වගඋත්තරකරු ලෙස සැලකෙන කොම්පැනියේ නියෝජිතයා හැටියට වතුයායේ අධ්‍යක්ෂවරයා ඇය පදිංචි කාමරය දවස් 12 කින් අත්හැර ගොස් එහි භුක්තිය වතුයායේ අධිකාරින්ට බාරදෙන ලෙස නිවේදනය කර තිබේ. ඈ විසින් මෙය පැහැර හරින ලද නිසා ඇය එයින් පිටමං කිරීම පිණිස මේ නඩුව ඇයට විරුඬව බදුල්ලේ රික්වෙස්ට්උසාවියේ පවරා තිබේ. බදුල්ලේ රික්වැස්ට් උසාවියේ උගත් කොමසාරිස්වරයා ඇය පිටමං කිරීමට නියෝග කරන ලදින් ඇය එම තීන්දුවට විරුඬව මෙම අධිකරණයට ඇපැල් පෙත්සමක් ඉදිරිපත් කළාය.

ප්‍රශ්නයට භාජන වූ මෙම ලැයිම් කාමරයේ පදිංචිය පිළිබඳව විත්තිකාරියගේ නීත්‍යානුකූල තත්ඛය විභාග කිරීම මා පිට පැවරී තිබේ. වතුයායේ වැඩ කරන්නියක් හැටියට ඇගේ රක්ෂාවේ කොන්ත්‍රාත්තුව සමගම ඊට අතිරේක වශයෙන් එක් අතකින් කොම්පැනිය සහ අනික් අතින් වැඩකරන්නියක් හැටියට ඇය අතර තවත් කොන්ත්‍රාත්තුවක් ද ඇතිවී තිබෙන බවට සැකයක් නැත. මේ කොන්ත්‍රාත්තුවෙන් වතුයායේ වැඩ කරන තැනැත්තියක් හැටියට ඇයට පදිංචිවීමට ලැයිම් කාමරයක් දීමට කොම්පැනිය කැමති වී ඇත. මෙහිදී ඈ ගෙවල් කුලියටගත් තැනැත්තියක් නොව පදිංචිවීමට අවසර ලද්දියක් හැටියට ගැණෙන බව මෙහිලා සළකමු. එය එසේ වුවත් ලැයිමේ කාමරයක මෙසේ පදිංචිවීමට අවසර දෙන මෙම කොන්ත්‍රාත්තුව ද නීත්‍යානුකූලව විභාග කළ යුතු ය. වතුයායේ වැඩකරන්නියක් හැටියට මෙම ලැයිම් කාමරය පාවිච්චි කිරීම එක්තරා අයිතිවාසිකමකි. ඈ එහි වැඩකරන්නියක් නොවූ විට මෙම ලැයිම් කාමරය පදිංචිය සඳහා භාවිතා කිරීමේ අයිතිවාසිකම නැතිවියාම ගැන ද කිසිදු සැකයක් නැත. නමුත් මෙම අවසරය පිළිබඳ කොන්ත්‍රාත්තුව ගැන සළකා බලන විට එම කොන්ත්‍රාත්තුව ඇතිකරගත් අවස්ථාවෙහි තිබුණු කරුණු වල තත්ඛය අනුව අවධාරණයෙන් ගතහැකි යම් යම් කරුණු මෙම කොන්ත්‍රාත්තුවේ අවිද්‍යමාන යයි සිතිය හැකි ද? මෙම රටේ සාමාන්‍යයෙන් කෙනෙකුට පෙණෙන කම්කරුවන්ගේ ගණයට මෙවැනි ඉන්දියානු කම්කරුවන් ඇතුළත් කළ නොහැකි බව සැබෑය. ඔවුහු තමන් පදිංචි මෙම භූමියෙහි ආගන්තුකයෝ ය. එබැවින් ඔවුනට ම අයත් නිවාස එහි නොමැත. බොහෝ විට ඔවුන්ගේ සම්භවය ලද මුල් වාසභූමියට ආපසු යාමට ද ඔවුන්ට නුපුළුවන. මේ නියායෙන් බලන කල ඔවුන් ඉවක් බවක් නොමැතිව පිටමං කර මහ මාඟියට අවතීර්ණ කිරීමට කටයුතු සැලසුණොත් එය සානුකම්පික ක්‍රියාවකි. ඔවුන්ට තමන්ගේ සහල් කොටස පවා ලබාගැනීමට හැක්කේ ඔවුන් රැකියාවෙහි නියුක්ත වතුයායෙන් එය ලැබෙන සේ කටයුතු සැලසි ඇතහොත් පමණි. කරුණු මෙසේ නිසා මෙහි ඇති නීත්‍යානුකූල තත්ඛය නම් ඔවුන්ගේ සේවය පිළිබඳව ඇති කොන්ත්‍රාත්තුව නිමාවට යත්ම ඔවුන් පදිංචි ලැයිම් කාමරයෙන් දෙවට දැමීමට හැකිවෙතත් ඔවුන් එසේ බැහැර කළ හැක්කේ සාධාරණ ලෙස කල් දෙන නිවේදනයකින් පසුවයයි කෙනෙකුට අවධාරණයෙන් ගතහැකි කොන්දේසියක් මෙහි විද්‍යමාන වේය යන්න මගේ අදහසය. මෙම ඇපැල්කාරියට දෙන ලද දෙදොස් දවසක කාලය ඇති නිවේදනය මෙම නඩුවෙහි කරුණු ගැන විමසා බලන විට සාධාරණ යයි කිසිසේත් කිව නොහේ. මෙම නඩුවෙහි සියළු කරුණු සිතා බලන විට ද එමෙන් ම මෙම රටෙහි ඉන්දියානු කම්කරුවන් විඳින පීඩාකාරී තත්ඛය ගැන සළකන විට ද මෙවැනි අවස්ථාවක දී අඩු වශයෙන් තුන්මාසයක කාලසීමාවක් දීම සාධාරණ ඉවත්වීමේ නියෝගයකැයි මම කල්පනා කරමි.

එමනිසා ඇපැල්කාරියට සාධාරණ ලෙස කල්දෙන නිවේදනයක් නොදී ඇගේ අයිතිවාසිකම ඇයට නැතිවී යන ලෙස ලැයිමෙන් බැහැර කිරීමට දෙන ලද නියෝගය නීතිවිරෝධී ලෙස මම සලකමි.

එබැවින් ඇපැල්කාරියගේ මෙම ඇපෑලට ඉඩදෙන මම ලැයිමෙන් බැහැර කිරීමට දෙන ලද නියෝගය නිෂ්ප්‍රභා කරමි. මෙම ඇපැලට ඉඩදෙන්නේ එයට වියදම් වූ ගාස්තුව ද අයකරගත හැකි පරිදිය.

ඇපෑලට ඉඩ දෙන ලදී.

ගරු අබේසුන්දර විනිශ්චයකාරතුමා ඉදිරිපිට

පී. ලොකුබණ්ඩා එ. නුවර සහකාර ගොවිජනසේවා කොමසාරිස්*

ශ්‍රේෂ්ඨාධිකරණයේ අංකය: 236/63—නුවර මහේස්ත්‍රාත් උසාවියේ අංකය: 27850

විවාද කළ දින: 1963 සැප්තැම්බර් මස 4 සහ 5 වන දිනයන්හි.
තීන්දු කළ දිනය: 1963 ඔක්තෝබර් මස 1 වන දින.

කුඹුරු පණත, වෙළ 1958, අංක 1—ගොවි ජනසේවා උප කොමසාරිස්වරයෙකු විසින් 3 (2) ඡේදය යටතේ කළ පරීක්ෂණයක්—3 (3) (බී) ඡේදය අනුව කරණ ලද පිටමන් කිරීමේ නියෝගයක්—ඇපැල්කරුට විරුඬව 21 (1) ඡේදය යටතේ ඇපැල්කරුගෙන් කරුණු විමසා පිටමන් කිරීමේ නියෝගයක් යදිමින් වෙන උප-කොමසාරිස්වරයකු විසින් මහේස්ත්‍රාත්තුමාට ඉදිරිපත් කරණ ලද වාර්තාවක්—3 (3) (බී) දරණ ඡේදය යටතේ දෙන ලද පිටමන් කිරීමේ නියෝගය නීත්‍යානුකූල යයි මහේස්ත්‍රාත්තුමා සෑහීමට පත් කිරීම පිණිස කොමසාරිස්වරයා වෙත පැවරී ඇති යුතුකම—මෙය කළ හැක්කේ කෙසේ ද යන්න—තමා පිටමන් නොකළ යුත්තේ කුමන හේතූන් නිසාද යන්න ඔප්පු කිරීමේ කාර්‍ය භාරය ඇපැල්කරු පිට පැවරී තිබීම—මේ කාර්‍ය භාරයෙන් ඔහු නිදහස් විය යුත්තේ කෙසේ ද යන්න.

කුඹුරු පණතේ 3 (2) ඡේදය අනුව පවත්වන ලද පරීක්ෂණයකින් පසු එහි 3 (3) (බී) ඡේදයට අනුකූලව නිකුත් කරණ ලද පිටමන් කිරීමේ නියෝගයකින් පසුව පවා කුඹුරෙන් ඉවත් නොවූ ඇපැල්කරු ඉන් පිටමන් කිරීම පිණිස නියෝගයක් යදිමින් 21 (1) ඡේදය යටතේ ගොවි ජනසේවා උප කොමසාරිස්වරයෙකු වන ඉල්ලුම්කරු මහේස්ත්‍රාත්තුමාට වාර්තාවක් ඉදිරිපත් කෙළේය.

මේ සඳහා නිකුත් කරණ ලද සිතාසියට කීකරු වී මහේස්ත්‍රාත්තුමා ඉදිරියට පැමිණි ඇපැල්කරු එසේ තමා පිටමන් කිරීමට විරුඬව කරුණු දක්වා සිටියේ ය. කෙසේ නමුත් උගත් මහේස්ත්‍රාත්තුමා මෙසේ තීන්දු කෙළේය:

(i) පැමිණිලිකරු විසින් "කුඹුරු පණතට අනුකූලව ගත යුතු සෑම අවශ්‍ය පියවරක්ම ගන්නා ලද බවට තමා තෘප්තියට පත්වූ බව" සහ

(ii) ප්‍රශ්නයට භාජන වී ඇති කුඹුරේ තමාට සිටීමට අයිතියක් ඇති බව ඔප්පු කිරීමට ඇපැල්කරුට නොහැකිවූ බවත් ය.

මෙසේ තීන්දු කළ මහේස්ත්‍රාත්තුමා තමා වෙතින් යාඥා කරණ ලද පරිදි පිටමන් කිරීමේ නියෝගයක් ද දුන්නේ ය.

මේ සඳහා ඉදිරිපත් කරණ ලද ඇපැලේදී පහත සඳහන් පරිදි තර්ක කරණ ලදී:—

(ඒ) පණතේ 3 (3) (බී) ඡේදයට අනුව කුඹුරෙන් පිටමන් කිරීමට දෙන ලද යළෝක්ත නියෝගය දෙන ලද්දේ ඉල්ලුම්කරු විසින් නොව ඔහුට කලින් රාජකාරිය කරණ ලද නිලධාරියා විසින් බව;

(බී) මහේස්ත්‍රාත්වරයා විසින් තමාගේ නියෝගය දීමට කලින් කොමසාරිස්වරයා විසින් 3 (3) (බී) ඡේදය යටතේ දෙන ලද නියෝගය නීත්‍යානුකූල යයි තෘප්තියට පත් විය යුතු බව ; සහ

(සී) කොමසාරිස්වරයා විසින් මෙසේ දෙන ලද නියෝගය නීත්‍යානුකූල යයි ඔප්පු කිරීමේ භාරය ඉල්ලුම්කරු පිට පැවරී තිබෙන බව සහ එම නියෝගය 3 (3) (බී) ඡේදය යටතේ කොමසාරිස්වරයා විසින් කිරීමට ආඥා බලය ලැබීම සඳහා අවශ්‍ය ඇතැම් කරුණු ස්ථාපිත කිරීමට ඉල්ලුම්කරුට නොහැකි වී ඇති බවත් ය.

තීන්දුව :—(1) පණතේ 21 (1) ඡේදයට අනුව කෙනෙකු පිටමන් කිරීමේ නියෝගයක් දීමට පෙර, එහි 3 (3) (බී) ඡේදය යටතේ උප කොමසාරිස්වරයා කළ නියෝගය කිරීමට ඔහුට ආඥා බලය (**Jurisdiction**) ලැබී ඇති බව පිළිබඳව මහේස්ත්‍රාත්වරයා සෑහීමකට පත්විය යුතු ය.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයේ 65 වෙනි කා., 31 වෙනි පිටබලනු.

(2) තමා පිටමන් නොකිරීමට හේතු දැක්වීමේ කාර්ය භාරය ඇපැල්කරු පිට පැවරී ඇති දෙයකි.

(3) ඇපැල්කරු වෙනුවෙන් කෝන්තර ඇසිමේදී අනාවරණය වූ කරුණුවලින් පණතේ 3 (3) (බී) ඡේදයට අනුව කොමසාරිස්වරයාට නීත්‍යානුකූල නියෝගයක් නිකුත් කිරීමට අඥ බලය පැවරීමට තරම් කරුණු නොමැති බවට ඇපැල්කරු මනා හේතු යුක්තීන් සාක්ෂි සහිතව පෙන්වා ඇති බව සහ,

(4) එම නිසා ඉල්ලුම්කරු විසින් එකී උප කොමසාරිස්වරයාගේ නියෝගය නීත්‍යානුකූලව කරණ ලද්දයි උසාවිය තෘප්තියට පත් කළා යයි පිළිගත නොහැකි බවත් ය.

නීතිඥවරු:— රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා, ජී. ටී. සමරවික්‍රම මහතා සමග, වගඋත්තරකාර-ඇපැල්කරු වෙනුවෙන්.

රජයේ අධිනීතිඥ ආර්. ඇස්. වනසුන්දර මහතා, ඉල්ලුම්කාර-වගඋත්තරකරු වෙනුවෙන්.

අබේසුන්දර විනිශ්චයකාරතුමා:

මෙම නඩු තීන්දුවෙහි මින්පසු ඉල්ලුම්කාර වගඋත්තරකරු යනුවෙන් හැඳින්වෙන, මහනුවර දිස්ත්‍රික්කයේ ගොවිජනසේවා උපකොමසාරිස්තුමා, මෙහි පහත පණත නමින් සඳහන් කෙරෙන වෂී 1958 නො: 1 දරණ කුඹුරු පණතේ 21 (1) දරණ ඡේදය යටතේ මහනුවර මහේස්ත්‍රාත් උසාවියට රපෝර්තුවක් ඉදිරිපත් කෙළේය. එහි සඳහන් වූ කරුණු මෙසේ වේ—

(ඒ) එලමුල්ල පාත කොටස නමියුත් කුඹුරේ ගොවිතැන්කරන්නා හා බදුකාරයා වන තැනත්තා නියමිත හේතුවක් නොමැතිව වෂී 1956 අප්‍රෙල් මස 12 වන දින ඉන් පිටමං කරන ලද්දයි පණතේ 3 (2) දරණ ඡේදයට අනුව පවත්වන ලද පරීක්ෂණයකදී තීරණය වී තිබේ.

(බී) මෙම තීරණය කුඹුරු නිමියාට ලියා දන්වන ලදුව ඔහු එම තීරණයට විරුඬව සංශෝධක මණ්ඩලයට (Board of Review) එයට විරුඬව අභියාචනයක් ඉදිරිපත් කර නැත.

(සී) පණතෙහි 3 (3) (බී) දරණ ඡේදයට අනුව කරන ලද මෙම නියෝගයෙන් පිටවලගෙදර ලොකුබණ්ඩා සහ එම කුඹුර අල්ලාගෙන ඇති අනිත් අය ද වෂී 1961 නොවැම්බර මස 5 වන දින හෝ ඊට කලින් ඉන් අස්වී යා යුතු ය.

(ඩී) එම නියෝගයෙන් පැනවෙන අයුරු පිටවලගෙදර ලොකුබණ්ඩා එකී කුඹුරෙන් ඉවත්වීම පැහැර හැර තිබේ.

මේ නියායෙන් ඔහු පිටවලගෙදර ලොකුබණ්ඩා එම කුඹුරෙන් ඉවත් කරන ලෙස එම උසාවියෙන් ආඥාවක් නිකුත් කිරීමට යයි යාඥා කරන අතර එච්. ඒ. විලියම් සිඤ්ඤෝ නැමති තෙවන එම කුඹුරෙහි හුක්තිය භාරදිය යුතු තැනැත්තා හැටියට ද සඳහන් කොට තිබේ.

එකී කුඹුරෙන් ඉවත් නො කිරීමට හේතු ඇත්නම් දක්වන ලෙස පිටවලගෙදර ලොකුබණ්ඩා නැමති තෙවන තැනැත්තාට සිතාසි නිකුත් විය. උසාවිය ඉදිරියට පැමිණි ඔහු තමාට මේ සඳහා හේතුසාධක පෙන්වීමට ඇතැයි කියා හිටියේ ය. ඉක්බිති මෙම අර්බුදය පරීක්ෂණයකට භාජන කිරීමට නියම විය. පවත්වන ලද පරීක්ෂණයෙන් පසු මහේස්ත්‍රාත්වරයා වෂී 1963 ජනවාරි මස 18 වන දින පහත සඳහන් පරිදි නියෝගයක් නිකුත් කෙළේය. එහි සඳහන්වූයේ ''පණතට අනුව ගැනීමට අවශ්‍ය සෑම පියවරක් ම පැමිණිලිකරු ගෙන ඇති බවට තමාට සෑහීමකට පත්වීමට'' කරුණු ඇති බවත් එම නිසා ''උසාවියට නඩුපොතේ අමුණා ඉදිරිපත් කළ ලිඛිත වාර්තාවේ සඳහන් භූමි ප්‍රමාණයට ඇතුළත් කුඹුර තමාට අයත් යයි පෙන්වීමට වගඋත්තරකරුට නො හැකිවූ නිසා එම වගඋත්තරකරුට විරුඬව ඔහු ඉන් බැහැර කිරීමේ නියෝගයක් ලැබීමට පැමිණිලිකරු සුදුසු බවකි''. වැඩිදුරටත් එම නියෝගයෙහි මෙසේ ද සඳහන් වේ: ''එබැවින් වගඋත්තරකරු සහ එම කුඹුර අල්ලාගෙන සිටින අනිත් සෑම අයවලුන් ම එම භූමිප්‍රමාණයෙන් බැහැර කළ යුතු ය''. මෙම නඩු තීන්දුවෙහි වගඋත්තරකාර-ඇපැල්කරු යයි සැලකෙන පිටවලගෙදර ලොකුබණ්ඩා නැමති තෙවන මහේස්ත්‍රාත්වරයා විසින් නිකුත් කරන ලද එම තීන්දුවට විරුඬව අභියාචනයක් මෙම උසාවියට ඉදිරිපත් කොට ඇත.

පණතෙහි 3 (3) (බී) දරණ ඡේදය යටතේ වගඋත්තරකාර ඇපැල්කරුට කුඹුරින් බැහැර වීමට යයි වෂී 1961 ඔක්තෝබර් මස 13 වන දින කරන ලද නියෝගය

කරන ලද්දේ මහනුවර දිස්ත්‍රික්කයේ එවකට ගොවිජනසේවා උපකොමසාරිස්වරයා විසිනි. ඔහු ගැන මින්පසු මෙම නඩු තීන්දුවේ සඳහන්වන්නේ උපකොමසාරිස්වරයා යන්නෙනි. වගඋත්තරකාර-ඇපල්කරු වෙනුවෙන් පෙනිසිටි නීතිවේදියා සැලකර සිටියේ එම කුඹුරෙන් වගඋත්තරකාර-ඇපැල්කරු පිටමං කිරීමට පෙර ඉහත සඳහන් පරිදි උපකොමසාරිස්වරයා කර තිබුණු නියෝගය නීත්‍යානුකූල යැයි මහේස්ත්‍රාත්වරයා තෘප්තියට පත්විය යුතුය යනු යි. උපකොමසාරිස්වරයාගේ නියෝගයෙන් නීතියුක්ති බව ඔප්පු කිරීමේ කාර්‍ය්‍ය භාරය ඉල්ලුම්කාර-වගඋත්තරකරු මත රඳා පවතින්නක් යයි ද ඔහු තර්ක කෙළේය. නමුත් ඉල්ලුම්කාර වගඋත්තරකරු වෙනුවෙන් පෙනී සිටි රජයේ අධිනීතිඥවරයා සැලකර සිටියේ මෙම කුඹුර අල්වාගෙන සිටීමට තමාට සුදුසුකම ඇති බව ඔප්පු කිරීමේ කාර්‍ය්‍ය භාරය ඇත්තේ වගඋත්තරකාර-ඇපැල්කරු වෙතය කියායි. එසේ කී ඔහු උපකොමසාරිස්තුමාගේ නියෝගයෙහි ඇති නීතියුක්තභාවය ඔප්පු කිරීමේ කාර්‍ය්‍ය භාරය ඉල්ලුම්කාර-වගඋත්තරකරු මත නොපැවරෙන බව කියේ ය. වගඋත්තරකාර-ඉල්ලුම්කරු වෙනුවෙන් සැලකර සිටි කරුණුවලට උපයෝගී කරගනිමින් **බණ්ඩාරනායක** එ. **සේනානායක** (62 න. නී. වා., 313 වන පිට) යන නඩුවෙහි මෙම උසාවිය විසින් දෙන ලද තීරණය ද මෙහිලා ගෙනහැර දක්වන ලදී. එම නඩුව විසඳන ලද්දේ මෙම උසාවියේ ගරු විනිශ්චයකාරවරුන් හත් දෙනෙකු විසිනි. ඉන් වැඩි දෙනෙකු විසින් තීරණය කරන ලද්දේ සමූපකාර සමිති ආඥා පණත යටතේ 46 වන ඡේදය අනුව පනවන ලද 38 (13) දරණ නීතිය යටතේ තීරකයෙකු විසින් දෙන ලද යම්කිසි තීරණයක් මෙම උසාවියෙහි තීන්දු ප්‍රකාශයක් ලෙස ක්‍රියාවෙහි යෙදවීම පිණිස මෙම උසාවියෙහි බලය යාඥා කර සිටින කල්හි එම තීරකතැනගේ තීරණය යමෙකුට විරුද්ධව දෙන ලද නම් ඒ තැනැත්තාට නිවේදනයක් යවා එහි ඇති යම් යම් අඩුලුහුඬු කම් පෙන්වීමට ඔහුට අවස්ථාවක් දිය යුතු බව ය. එම තීරණයෙහි බැලූ බැල්මට අඩුලුහුඬුකම් නොපෙණුනත් මෙම ක්‍රියාපටිපාටිය මෙසේ ම අනුගමනය කළ යුතු ය. එම විනිශ්චය මණ්ඩලයෙන් වැඩි දෙනෙකු ගත් මතය ශ්‍රේෂ්ඨ විනිශ්චයකාරතුමා විසින් **ඩබ්ලිව්. බාන්ස් ද සිල්වා** එ. **ගල්කිස්ස වටරප්පොල බඩු ගබඩා සමිතිය** (54 න.නී.වා. 326 පිට) යන නඩුවෙහි පහළ කරන ලද මතය සමඟ ද සැසඳෙන්නෙකි. ඒ මතය මෙසේ ය:—

"... විධායක බලය ඇති යම්කිසි අධිකරණයකින් එම බලය ක්‍රියාවෙහි යෙදවීමට යාඥාවක් කළ කල්හි, එබඳු යාඥාවකට එකඟව ආඥාවක් නිකුත් කිරීමට කලින් උසාවියට ඉදිරිපත්වී ඇති තීන්දුව හෝ තීරණය ආඥා පණතෙන් බලය ලැබූ යම්කිසි තැනැත්තෙකු විසින් දෙන ලද විනිශ්චය සැහෙන තීරණයක් බවත් එය දෙන ලද්දේ එම ආඥා පණතට අනුව පත්කරන ලද අධිකරණයෙන් පිටස්තර යම්කිසි අර්බුදයක් නිරාකරණය කිරීමට බලය ඇති තීරක මණ්ඩලයක් ඉදිරිපිට බවත් යන කරුණු පිළිබඳව එම අධිකරණය සෑහීමකට පත්විය යුතු ය. මෙසේ පත්වීම එම අධිකරණය මත පැවරී ඇති කාර්‍ය්‍යයකි. එම තීන්දුව පිළිගත යුත්තේය. උසාවියේ තීරණයක් මෙන් අදාළ නීතිය යටතේ ක්‍රියාත්මක කළ හැකි එකක්ය යන තීරණය උසාවිය යම් අවස්ථාවක ගන්නවා නම් පමණක් එය යුක්තියුක්ත ලෙස සැලකිය හැකිය."

ඉල්ලුම්කාර වගඋත්තරකරු වෙනුවෙන් සැලකර සිටින ලද කරුණු වලට උපයෝගී කරගැනීම පිණිස මතුගම මහේස්ත්‍රාත් උසාවියේ නොපැ: 26654 දරණ නඩුවේ ඇපැල (ශ්‍රේෂ්ඨාධිකරණයේ අංකය 84 ඒ-බී, වෂී 1958) තීන්දු කරමින් සන්සෝනි විනිශ්චයකාරතුමන් විසින් වෂී 1959 ජනවාරි මස 20 වෙනි දින දෙන ලද නඩු තීන්දුව උපුටා දක්වන ලදී. මේ නඩුවෙහිදී කළුතර රජයේ දිසාපතිවරයා ඉඩම් සංවර්ධන ආඥා පණතේ 120 වන ඡේදයට අනුව ක්‍රියාකරමින් මහේස්ත්‍රාත් උසාවියට ප්‍රාදේශීය ආදායම් පාලක නිලධාරියාගේ මාර්ගයෙන් වාර්තාවක් ඉදිරිපත් කළේය. එහි සඳහන් වූයේ යටොක්ත ආඥා පණතට අනුව ඇපැල්කරුට දෙන ලද බිම් කැබෙල්ලක් විධිමත් ලෙස අවලංගු වූ පසු ඔහු නීති විරෝධී ලෙස එම ඉඩම් කැබෙල්ලෙහි පදිංචි වී සිටින බවකි. ඉන් පිටමං වී යන ලෙස ඔහුට නිවේදනයක් දුන් පසුවත් ඔහු ඒ ඉඩමෙන් නික්මයාම පැහැර හරින ලද බව වැඩිදුරටත් එහි සඳහන් විය. මෙම ඇපැල නිෂ්ප්‍රභා කළ විනිශ්චයකාර තුමා තීන්දු කළේ එම ඉඩමෙන් පිටවී යාමට තමාට නිවේදනයක් දෙන ලද බව ඔප්පු කළ යුතුය යනු ඇපැල්කරුට කීමට ඉඩදිය නොහැකි බව හා මහේස්ත්‍රාත්තුමා ඉදිරියට පැමිණීමට සිතාසි ලැබූ නිසා මුලසිටම මෙය ඔප්පු කිරීමේ කාර්‍ය්‍ය භාරය සිතාසි ලද තැනැත්තා පිට බවත් එම නිසා ඉඩමෙන් තමා පිට නොකිරීමට ඇති හේතු දැක්වීම තමාගේ කාර්‍ය්‍ය බවත් කියමින් තීන්දුව දුන් විනිශ්චයකාරතුමා කරුණු දැක්වීමට පැමිණි තැනැත්තා එම ඉඩමෙහි පදිංචිව සිටීමට හේතුභූත වන කරුණු ඇති බව පිළිබඳව තෘප්තියට නොපැමුණුනහොත් ඒ තැනත්තා පිටමං කිරීමට නියෝගයක් දීමට මහේස්ත්‍රාත්තුමා බැඳී ඇති බව වැඩිදුරටත් තීන්දුවෙහි සඳහන් කර තිබේ.

ඉහත සඳහන් ශ්‍රේෂ්ඨ විනිශ්චයකාරතුමාගේ මතය කිසිලෙසකින් ඉවත හළ නොහැක්කකි. එය මෙම උසාවියෙහි විනිශ්චයකාරවරුන් තිදෙනෙකුගෙන් සං-

යුක්ත වූ විනිශ්චය මණ්ඩලයක් විසින් **ජයසිංහ** එ. **බොරගොඩවත්ත සමුපකාර බඩු ගබඩාව** (56 න.නි.වා. 462 පිට) අනුමැතියෙන් පිළිගන්නා ලදී. ඉහත සඳහන් **බණ්ඩහාමි** එ. **සේනානායක** යන නඩු තීන්දුවේදී සන්සෝනි විනිශ්චයකාරතුමා ද ඒ තීන්දුව සමග එකඟ විය.

ඉහත සඳහන් පරිදි වාතාගතවී ඇති එම නඩු තුනෙන් ම ගෙනහැර දැක්විය හැකි ප්‍රඥප්තිය නම් අධිකරණයකින් නිකුත් නොකරනලද යම්කිසි නියෝගයක් ක්‍රියාවේ යෙදීමට යයි ලිඛිත නීතියක අනුසාරයෙන් උසාවියකින් බලය ඉල්ලූවිට එම උසාවිය එකී නියෝගයන් නීත්‍යානුකූල නියෝගයක් යැයි ද එම නියෝගය බල පවත්වන තැනත්තාට එහි ඇති නීත්‍යානුකූල භාවයට විරුද්ධව පහර ගැසීමට ඉඩ ඇතැයි ද යන කරුණු පිළිබඳව සෑහීමකට පත්විය බව ය. එබැවින් මා ඉදිරියෙහි ඇති මෙම ඇපැල තීරණය කිරීමෙහි ලා ඒ ප්‍රඥප්තිය උපයෝගී කර ගන්නෙමි.

ආඥා පණතේ 3 (3) (බී) දරණ ඡේදය යටතේ උපකොමසාරිස්වරයාගේ නියෝගය ක්‍රියාවේ යෙදවීමට මෙහිදී මහේස්ත්‍රාත් උසාවියේ බලය යෙදීමටයයි ඉල්ලීමක් කර ඇති නිසා මහේස්ත්‍රාත්වරයාගේ කායර්‍ය විය යුතුව තිබුණේ ප්‍රශ්නයට භාජනවී ඇති කුඹුරෙන් වගඋත්තරකාර ඇපල්කරු පිටමං කිරීමට කලින් උපකොමසාරිස්වරයාගේ නියෝගය නීත්‍යානුකූල අන්දමින් දෙන ලද්දකැයි තෘප්තියට පැමිණීම ය. මහේස්ත්‍රාත්වරයා තම නියෝගයෙහි ''පැමිණිලිකරු පණතට අනුව ගත යුතු සෑම අවශ්‍ය පියවරක් ම ගෙන ඇතැයි තමා තෘප්තියට පත්වූ බව'' සඳහන් කර තිබේ. පණතේ 21 (1) ඡේදය යටතේ වාතාව උසාවියට ඉදිරිපත් කළ නිලධාරියා, එනම් තමාගේ නියෝගයෙහි මහේස්ත්‍රාත්වරයා විසින් ''පැමිණිලිකරු'' යනුවෙන් සඳහන් කරන ලද තැනත්තා, පණතේ 3 (3) (බී) දරණ ඡේදය යටතේ එම නියෝගය දී ඇති උපකොමසාරිස්වරයා නොවේ. මෙහිදී 3 (3) (බී) ඡේදය යටතේ නියෝගය දී ඇති උපකොමසාරිස්වරයාට එම නියෝගය දීමට පණතට අනුව ආඥා බලය ඇද්ද යන්න ගැන මහේස්ත්‍රාත්වරයා සෑහීමකට පත්විය යුතුව තිබුණි. පණතේ 3 වන ඡේදයේ 2 සහ 3 දරණ උපඡේදයන්හි 3 (3) (බී) යන ඡේදයට අනුව නියෝගයක් දීමට බලය ලැබිය යුතු කෙසේදැයන කරුණු ගැන සඳහන් වී ඇත. මේ නිසා එම කරුණු නොමැතිව කරන ලද යම්කිසි නියෝගයක් වෙතොත් එය නීත්‍යානුකූලව බලන විට නිර්බල නියෝගයක් ලෙස ගැනේ. මේ කුඹුරෙන් පිටමං කිරීමට හේතු දැක්වීමේ කායර්‍ය භාරය වගඋත්තරකාර ඇපල්කරු පිට පැවරී තිබුණ දෙයකි. මෙසේ වූ කල යම්හෙයකින් ඔහු ඉල්ලුම්කාර වගඋත්තරකරු විසින් උසාවියට ඉදිරිපත් කරන ලද සාක්ෂි වලින් එම උපකොමසාරිස්වරයා දෙන ලද නියෝගය නීත්‍යානුකූලව කරණ ලද්දක් නොවේයැයි ඔප්පු කළේ නම් ඔහු තම කායර්‍ය භාරයෙන් නියම හේතු දක්වා මිදුණු බව පිළිගත හැක. එමතු ද නොව තමා අකීකරු වියයි කියන එම නියෝගය සහ එම නියෝගයේ නියායෙන් තමා එම කුඹුරෙන් පිටමං කිරීමට ඉල්ලුම්කාර වගඋත්තරකරු විසින් උසාවියෙන් බලය ඉල්ලීම ද නීත්‍යානුකූල නොවේයැයි කීමට අවකාශ තිබිණි. ඉල්ලුම්කාර වගඋත්තරකරුගේ සමහර සාක්ෂි කරුවන්ගේ කෝන්තර ඇසීමේ ක්‍රමයෙන් වගඋත්තරකාර ඉල්ලුම්කරු උපකොමසාරිස්වරයාට පණතේ 3 (3) (බී) දරණ ඡේදය යටතේ නියෝගයක් දීමට බලය ලැබෙන යම් යම් කරුණු ඇති බව ඔප්පු වී නැතැයි පෙන්වා දී තිබේ.

පණතේ 3 (2) දරණ ඡේදය යටතේ පරීක්ෂණය පවත්වන ලද උපකොමසාරිස්වරයා ඒ. ඊ. ඒ. හෙපන්ස්ටෝල් මහතා ය. මහේස්ත්‍රාත්වරයා ඉදිරියෙහි සාක්කි දුන් ඔහු කියේ මෙම කුඹුර දළඳ මාළිගාවට අයත් බව ය. පරීක්ෂණය පැවත්වූ පසු මෙම කුඹුර කුළියට වැපුරූ තැනත්තා විලියම් සිඤ්ඤො නැමත්තෙකු බවත් වසී 1956 අප්‍රෙල් මස 12 වන දින ඔහු ඉන් පිටමං කරණ ලද බවත් ඉඩම් හිමිකරුවා වූ දියවඩන නිලමේ තුමාට මෙම පරීක්ෂණය පිළිබඳව නිවේදනය කරන ලද දැයි තමාට ස්ථිර වශයෙන් කිය නොහැකි බවත් එහෙත් වසී 1960 අගෝස්තු මස 15 වන දින උපකොමසාරිස්වරයාගේ තීරණය දියවඩන නිලමේ තුමාට දන්වන ලද බවත් සාක්ෂියෙහිදී ඔහු වැඩිදුරටත් කියා සිටියේ ය. ඉල්ලුම්කාර වගඋත්තරකරු වන පී. ඇල්. ඇන්. ද සිල්වා මහතා මහේස්ත්‍රාත්වරයා ඉදිරියේ සාක්ෂි දෙමින් කීයේ පණතේ 3 (2) දරණ ඡේදයෙන් එම පරීක්ෂණය පිළිබඳව ඉඩම් හිමියාට නිවේදනයක් යැවිය යුතු බවත් මෙම නිවේදනයට විශේෂ පෝර්මයක් ඇති බවත් එය අංක 15 දරණ පෝර්මය බවත් එම අංක 15 දරණ පෝර්මය දියවඩන නිලමෙතුමාට යවන ලද බවත් ය. දියවඩන නිලමෙතුමාට මෙබදු නියෝගයක් යවන ලද බව එතුමාට එම නිවේදනය ඉදිරිපත් කිරීමට යයි සිතාසි යවා ඔප්පු කළ යුතුව තිබුණි. මෙසේ සිතාසි යවන ලද කල්හි එම නිවේදනය මහේස්ත්‍රාත්වරයා ඉදිරිපිට ඔහු නොගෙනෙන ලද්දේ නම් එම නිවේදනයෙහි පිටපතක් ඉදිරිපත් කිරීමෙන් ඉල්ලුම්කාර-වගඋත්තරකරු ඒ පිළිබඳව ද්විතීයික සාක්ෂි ඉදිරිපත් කළ යුතුව තිබුණි. නමුත් දියවඩන නිලමෙතුමාට මෙම පරීක්ෂණය පිළිබඳව නිවේදනයක් යවන ලදැයි තමා කළ ප්‍රකාශය ස්ථිර කිරීම පිණිස සාක්ෂි කැඳවීමට ඇපැල්කාර වගඋත්තරකරුට නොහැකි විය. එබැවින් දියවඩන නිලමේ

තුමාට මෙම පරීක්ෂණය පිළිබඳව නිවේදනයක් යැවූ බව ඔප්පු වන හේතුසාධක නොමැති බව මා පිළිගන්නා අතර ඒ අනුව ම ආඥා පණතේ 3 (2) දරණ ඡේදය යටතේ පවත්වන ලද පරීක්ෂණයකදී නියෝජිතයෙකු මාඟියෙන් හෝ පුද්ගලිකවම පැමිණ කරුණු දැක්වීමේ අවස්ථාවක් ඉඩම්හිමියාට දෙන ලද බව ඔප්පු කිරීමට කරුණු නොමැති බව මම පිළිගනිමි.

උපකොමසාරිස්වරයා පරීක්ෂණයෙන් පසු ඵළඹුණු තීරණය වෂී 1960 අගෝස්තු මස 15 වෙනි දින දරණ 'පී' 1 දමා සළකුණු කරන ලද දියවඩන නිලමෙතුමාට යැවූ ලියමනෙන් එම තීරණය එතුමාට යවන ලද බව ඔප්පු කිරීම සඳහා ඇපැල්කාර-වගඋත්තරකරු විසින් එයින් සහයෝගය පැතීය. නමුත් 'පී' 1 දමා සළකුණු කරන ලද ලියමනෙන් දියවඩන නිලමෙතුමා උපකොමසාරිස්වරයාගෙන් ලැබුණු ලියුම් 4 ක් ගැන සඳහන් කොට තිබේ. ඒ සෑම ලිපියකම එම දිනය ඇතුළත් වී ඇති අතර එහි ලිපි අංක පමණක් වෙනස් වේ. නමුත් ඒ ඒ ලියුම් කුමන විෂයක් පිළිබඳව ලියන ලද්දක් දැයි අනාවරණය වී නැත. මේ නියායෙන් සලකන විට 'පී' 1 දමා සළකුණු කර ඇති ලියමනෙන් ඉල්ලුම්කාර-වගඋත්තරකරු විසින් ලබාගත හැකි යයි අදහස් කරන අවධාරණය එනම් උපකෙ මසාරිස්වරය ගේ ඉහත සඳහන් තීරණය දියවඩන නිලමෙතුමාට යවන ලදැයි යන්න ලබාගැනීමට නුපුළුවන් වේ. දියවඩන නිලමෙතුමාට එබඳු තීරණයක නිවේදනයක් යවන ලද බව ඔප්පු වී නැති බව මම තීරණය කරමි.

මෙම කුඹුරෙන් විලියම් සිඤ්ඤෙ නැමත්තා දෙවට දැමීමට පිළිබඳව හෙපන්ස්ටෝල් මහතා විසින් කියන ලද සාක්ෂියෙන් කියැවෙන්නේ මෙම පිටමං කිරීම වෂී 1956 අප්‍රෙල් මස 12 වෙනිදායින් පසු සිදුවූවක් බවයි. කුඹුරු පණත මෙම කුඹුර සම්පූර්ණ වශයෙන් හෝ ප්‍රධාන වශයෙන් පිහිටා තිබෙන පරිපාලන ප්‍රදේශයෙහි බලපැවත්වීමට පෙර විලියම් සිඤ්ඤො පිටමං කරන ලදැයි ඒත්තු ගැනීමට කිසිම සාක්ෂියක් නැත. කුඹුරු පණතෙහි 3 (2) දරණ ඡේදය අදළ වන්නේ යම්කිසි කුඹුරක් බදුකරමින් වපුරන්නායයි කියනු ලබන්නා වෂී 1956 අප්‍රෙල් මස 12 වෙනිදායින් පසුව එසේම කුඹුරු පණත එම කුඹුර සම්පූර්ණ වශයෙන් හෝ ප්‍රධාන වශයෙන් පිහිටා ඇති පරිපාලන ප්‍රදේශයෙහි බලපැවත්වීමට කලින් එම කුඹුරෙන් පිටමං කළ කලෙක පමණි.

මේ අනුව බලන කල පණතේ 3 (3) (බී) දරණ ඡේදය යටතේ උපකොමසාරිස්වරයාට නියෝගයක් දීම සඳහා ආඥා බලය ලැබීමට අවශ්‍ය සමහර කරුණු මෙහි ඇතැයි ඔප්පු කිරීමට ඉල්ලුම්කාර-වගඋත්තරකරුට නොහැකි වී තිබේ. මේ අයුරින් ඔහුට එය කිරීමට නොහැකිවීම උපකොමසාරිස්වරයාට මෙහිදී එබඳු ආඥා බලයක් ඇතැයි ඔප්පු කිරීමට නොහැකි වීමක් ලෙස ගිණිය හැක. එබැවින් මහේස්ත්‍රාත්වරයා ඉදිරියෙහි ඉල්ලුම්කාර-වගඋත්තරකරු ගෙනහැර දැක්වූ සාක්ෂිවලින් ඔහු පණතේ 3 (3) (බී) දරණ ඡේදය යටතේ උපකොමසාරිස්වරයාගේ නියෝගය නීත්‍යානුකූල යයි ඉල්ලුම්කාර-වගඋත්තරකරු උසාවිය තෘප්තියට පත් නොකරන ලද බව මම තීන්දු කරමි.

එම නිසා 1963 ජනවාරි මස 18 වෙනි දින මහේස්ත්‍රාත්වරයා විසින් දෙන ලද නියෝගය මම මෙයින් ඉවත හෙළමි.

ඇපැලට ඉඩ දෙන ලදී.

ගරු හේරත් විනිශ්චයකාරතුමා ඉදිරිපිට

ගුණසේකර එ. උප පොලිස් පරිෂක රාජගුරු*

ශ්‍රේෂ්ඨාධිකරණයේ නෝ: 839/1961—කොළඹ මහේස්ත්‍රාත් උසාවියේ නෝ: 46299/ඒ.

වාද කළේ සහ නිතු කළේ : 1962 මාර්තු 21 වැනිද.

සාක්ෂිය—සටහන් පොතේ මූලික සටහනක් හෝ සෝදිසි වරෙන්තුවක් හෝ නැතිව පොලිස් නිලධාරියෙකු විසින් වැටලීමක් මෙහෙයවීම—එවැනි පොලිස් නිලධාරියෙකුගේ සාක්ෂිය ඇතුල් කළ හැකි බව—චිත්තියේ සාක්ෂිකරුගේ සාක්ෂිය මහේස්ත්‍රාත්වරයා විසින් ප්‍රතික්ෂේප කිරීම—එසේ කිරීමට ප්‍රථමයෙන් සලකා බැලිය යුතු කරුණු—කුරහ තරහ ආඥා පණත, 3 වෙනි ඡේදය යටතේ චෝදනාවක්.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 65 වෙනි කා., 37 වෙනි පිට බලනු.

නීතිය:— (1) තමාගේ සටහන් පොතේ මූලික සටහනක් වත් නොකර සෝදිසි වරෙන්තුවක් ද ලබා නො ගෙන පොලිස් නිලධාරියෙකු විසින් වැටලීමක් කළ විට එම නිලධාරියාගේ සාක්ෂිය ඇතුලත් කළ හැකි නමුත් එම සාක්ෂිය ඉතා ප්‍රවේශමෙන් සලකා බැලිය යුතු ය.

(2) සාක්ෂිකරුවෙකුගේ සාක්ෂිය මහේස්ත්‍රාත්වරයෙකු විසින් ප්‍රතික්ෂේප කිරීමට ප්‍රථමයෙන් හරස් ප්‍රශ්න ඇසීමෙන් හෝ වෙන යම් අඳුමකින් හෝ හෙළිවන කරුණු සහ සාක්ෂිකරුගේ ලීලාව පිළිබඳ ප්‍රශ්න සලකා බැලිය යුතු ය.

නීතිඥවරු:— ඇම්. ඇම්. කුමාරකුලසිංහම්, විත්තිකාර-ඇපැල්කරු වෙනුවෙන්.

ආණ්ඩුවේ අයිනීතිඥ ඇල්. සී. පෙරේරා, ඇටෝර්නි ජෙනරාල්තුමා වෙනුවෙන්.

ගරු හේරත් විනිශ්චයකාරතුමා.

නීතිවිරෝධී ඔට්ටුවක් භාරගැනීම සහ හුවමාරුකිරීම සම්බන්ධයෙන් මේ නඩුවේ විත්තිකරුට චෝදනා නහන ලදී. මේ සිඩියේදී විත්තිකාර-ඇපැල්කරුගේ සථානය වැටලූ පොලිස් නිලධාරියා ලඟ ඒ සඳහා සෝදිසි වරෙන්තුවක් තිබුනේ නැත. එම වැටලීමට තුඩු දුන් හේතු ගැන වැටලීමට ප්‍රථමයෙන් සඛකීය සටහන් පොතේ කළ සටහන් කිසිවක් ඉදිරිපත් කිරීමට ද ඔහුට බැරිවිය. මේ මූලික පියවර කිසිවක් නොගෙන පොලිස් නිලධාරියා විසින් එම සථානය වටලා ඇත. ඔහුගේ සාක්ෂිය අනුව විත්තිකාර-ඇපැල්කරු සහ මුත්තයියා නමැති මිනිසෙකු එකට මේසයක් ලඟ වාඩිවී සිටිය අතර ඔත්තුකාරයෙකු විසින් ගෙවන ලද සටහනක් සහිත මුදල් නෝට්ටුව ද අශ්වයින් තිදෙනෙකුගේ නම් සහිත ඔට්ටු කොළයක් ද එම මේසයේ ලාච්චුවක තිබී සොයාගෙන ඇත. ඔත්තුකාරයා ද වැටලීම මෙහෙය වූ පරීක්ෂක තැන ද සාක්ෂි දුන්හ. ඉහත නම් සඳහන් මුත්තයියා පොලිස් සථානයට ගෙන ගොස් ඔහුගේ කටඋත්තර සටහන් කරගෙන තිබේ. ඇත්ත වශයෙන් පැමිණිල්ලේ සාක්ෂිකරුවෙකු ලෙස ඔහුගේ නම ඇතුලත් වී තිබේ. කෙසේ වුවද, නඩු විභාගයේදී පැමිණිලි පක්ෂයෙන් මුත්තයියාට සාක්ෂි දීමට නොකැඳවන ලදී. නමුත් විත්තිකාර-ඇපැල්කරු විසින් ඔහු කැඳවන ලදී. වැටලීමට කලින් විත්තිකාරයෙකු පැමිණ මුදල් නොගෙවූ බව මුත්තයියා සාක්ෂියේදී කියා සිටියේය. කොයි අන්දමකින් වත් මුත්තයියා ගෙන් හරස් ප්‍රශ්න අසා නැත.

සෝදිසි වරෙන්තුවක් හෝ තමාගේ සටහන් පොතේ මූලික සටහනක් හෝ නැතිව වැටලීමක් කළ පොලිස් නිලධාරියෙක් සාක්ෂි දෙන විට එම පොලිස් නිලධාරියාගේ සාක්ෂිය පිළිගත හැකි බවට කිසිම සැකයක් නැති නමුත් ඒ සාක්ෂිය ඉතා ප්‍රවේශමෙන් සලකා බැලිය යුතු බව මේ අධිකරණයෙන් තීරු කර තිබේ. ඒ අනුව මේ වැටලීම මෙහෙය වූ නිලධාරියාගේ සාක්ෂිය සලකා බැලීමට මට සිදුවී ඇත.

උගත් මහේස්ත්‍රාත්වරයා මුත්තයියාගේ සාක්ෂිය පිළිනොගත් නමුත් මුත්තයියාගේ සාක්ෂිය ප්‍රතික්ෂේප කිරීමට මොන හේතුවක් තිබුනේ ද යන ප්‍රශ්නය මතුවෙයි. සිඩියට ටික වේලාවකට පසුව පොලිසිය විසින් මුත්තයියාගේ කටඋත්තර සටහන් කරගෙන ඇති බව සාක්ෂිවලින් හෙළිවූ නමුත් මුත්තයියාගෙන් හරස් ප්‍රශ්න අසා ඔහුගේ ප්‍රකාශයේ ඇත්ත නැත්ත විභාග නොකිරීම පුදුමයට කරුණකි. මුත්තයියා සහ විත්තිකාර-ඇපැල්කරු අතර නැකමක් හෝ යාළු කමක් හෝ ඇති බව ඔප්පු කිරීමට වත් ඔහු පක්ෂපාත සාක්ෂිකරුවෙකු බව පෙන්වීමට වත් එකම ප්‍රශ්නයක් වත් ඔහුගෙන් නොඅසන ලදී.

සාමි මණ්ඩලයේ නඩුවක් වූ ''**බ්‍රවුන් එ. ඩන්**'' සහ අපරාධ ඇපැල් නඩු අධිකරණයේ ''**රජ එ. හාර්ට්**'' පිළිබඳව ''කොකල්ගේ වැදගත් නඩු'' නමැති ග්‍රන්ථයෙන් උපුටා ගත් සමහර ඡේද විත්තිකාර-ඇපැල්කරුගේ උගත් නීතිඥ තැන මගේ සැලකිල්ලට භාජන කළේය. ''**බ්‍රවුන් එ. ඩන්**'' ගැන ''කොකල්ගේ වැදගත් නඩු'' නමැති ග්‍රන්ථයේ 257 වැනි පිටුවේ සඳහන් වන අතර 23 වැනි අපරාධ ඇපැල් නඩු වාර්තාවේ 252 වැනි පිටුවේ ''**රජ එ. හාර්ට්**'' වාර්තා වී ඇත. යම් සාක්ෂිකරුවෙකුගේ සාක්ෂිය තමා අවිශ්වාස කරණ බව හෝ ප්‍රතික්ෂේප කරණ බව යම් විනිශ්චයකාරයෙකු ප්‍රකාශ කිරීමට ප්‍රථමයෙන් හරස් ප්‍රශ්න ඇසීමෙන් ඊට හේතුවන කරුණු හෙළිකළ ගත යුතු යයි එම නඩුවලින් පෙනේ. හරස් ප්‍රශ්න ප්‍රමාණය එක එක නඩුව අනුව වෙනස් වන නමුත් සාක්ෂි කරුගේ විශ්වාසනීයත්වය එයින් මැණ ගත හැකිය. එවැනි සාධක ඇතිව තමා සාක්ෂිකරුවෙකු විශ්වාස කරන්නේ නැතැයි උගත් නඩුකාරයෙකු කියා සිටීම නොසෑහේ. හරස් ප්‍රශ්න ඇසීමෙන් හෝ නඩු විභාගයේදී වෙන යම් අන්දමකින් හෝ හෙළිවුන කරුණු සහ සාක්ෂිකරුගේ ලීලාව පිළිබඳ ප්‍රශ්න සලකා බැලීමට ප්‍රථමයෙන් සාක්ෂියක් ප්‍රතික්ෂේප කළ නොහැකි ය. මේ නඩුවේදී මේ සම්මත අවශ්‍යතාවයන් අනුව මුත්තයියාගේ සාක්ෂිය පරීක්ෂා කර බලා නැත. මේ නඩුවට අදළ සියළුම කරුණු සලකා බලන විට විත්තිකාර-ඇපැල්කරුට විරුඬ ව නහා ඇති චෝදනාව ඔප්පුවී ඇතැයි මට සතුටට පත්විය නොහැකිය.

එමනිසා මම දඬුවම ඉවත් කර විත්තිකාර-ඇපැල්කරු නිදහස් කරමි.

ඇපැලට ඉඩ දෙන ලදී.

ගරු එච්. ඇන්. ජී. ප්‍රනාඳු විනිශ්චයකාරතුමා ඉදිරිපිට.

ඔක්වේල් වතුයායේ අධ්‍යක්ෂ මහතා, හල්දුම්මුල්ල එ. ලංකා වතු කම්කරුවන්ගේ සංගමය*

ශ්‍රේෂ්ඨාධිකරණයේ අංකය: 13/62—කම්කරු උසාවියේ අංකය: 1/8082.

අඹන්පිටිය වතුයායේ අධ්‍යක්ෂ මහතා, අඹන්පිටිය එ. ලංකා වතු කම්කරු සංගමය*

ශ්‍රේෂ්ඨාධිකරණයේ නෝ: 35/62 දරණ නඩුව පිළිබඳව කම්කරු උසාවියේ අංකය: 4/2609.

හුන්නස්ගිරිය වතුකරය, ඇල්කඩුව එ. ලංකා වතුකම්කරුවන්ගේ සංගමය*

ශ්‍රේෂ්ඨාධිකරණයේ අංකය: 1/63—කම්කරු උසාවියේ අංකය: 6/4876.

විවාද කළ දිනය : 27 මැයි මස, 1963.
තීන්දු කළ දිනය : 30 සැප්තැම්බර් මස, 1963.

වතුකම්කරු (ඉන්දියානු) ආඥා පණත, (133 වන පරිච්ඡේදය)—ඉන්දියාවේ සිට ලංකාවට පැමිණි අයගෙන් පැවතෙන ලංකාව නිජභූමිය කොට ඇති තැනැත්තන්ට එම ආඥා පණත බලපවත්වන්නේ ද ?—තමා විසින් වැඩ නතර කරණ ලද සේවක-සේවිකාවන්ගේ අඹු සැමියන්ගේ වැඩත් යම් කිසි වතුයායක අධ්‍යක්ෂ වරයෙකුට නීත්‍යානුකූලව නතර කළ හැකි ද?

තීන්දුව:— වතුකම්කරු (ඉන්දියානු) ආඥා පණතේ (133 වන පරිච්ඡේදය), 23 වන ඡේදය සාමාන්‍යයෙන් "ඉන්දියානු වතු කම්කරුවන්" යයි හැඳින්වෙන ලංකාව නිජභූමිය කොට ඇති අයටත් බල පවත්වයි. එබැවින් "සේවා යෝජකයා" විසින් වැඩ නතර කිරීමේ ප්‍රතිඵලයක් වශයෙන් වැඩ කටයුතු අත්හැර යන සේවක-සේවිකාවන්ගේ අඹුසැමියන්ගේ වැඩ ද එම සේවායෝජකයා විසින් නතර කිරීම නීත්‍යානුකූල වේ.
"සේවා යෝජකයා" විසින් වැඩ නතර කිරීමේ ප්‍රතිඵලයක් වශයෙන් වැඩ කටයුතු අත්හැර යන සේවක-සේවිකාවන්ගේ අඹුසැමියන්ගේ වැඩ ද එම සේවායෝජකයා විසින් නතර කිරීම නීත්‍යානුකූල වේ.

නීතිඥ මණ්ඩලය:— රාජනීතිඥ එච්. වී. පෙරේරා මහතා, ඇල්. කදිරගාමර් මහතා සමග, ඇපැල්කරු වෙනුවෙන්.

ආචාර්‍ය කොල්වින් ආර්. ද සිල්වා මහතා, ආර්. විරකෝන් මහතා සමග, වගඋත්තරකරු වෙනුවෙන්. (ශ්‍රේෂ්ඨාධිකරණයේ අංක: 35/62 සහ අංක 1/63 පිළිබඳව.)

රාජනීතිඥ එච්. වී. පෙරේරා මහතා, රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා සහ ඇස්. ෂර්වානන්ද මහතා සමග, ඇපැල්කරු වෙනුවෙන්.

ආචාර්‍ය කොල්වින් ආර්. ද සිල්වා මහතා, ඇම්. ටී. ඇම්. සිවාර්දින් මහතා සහ ආර්. විරකෝන් මහතා සමග, වගඋත්තරකරු වෙනුවෙන්. (ශ්‍රේෂ්ඨාධිකරණයේ අංකය: 13/62 පිළිබඳව.)

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 65 වෙනි කා., 52 වෙනි පිට බලනු.

ගරු එච්. ඇන්. ජී. ප්‍රනාන්දු විනිශ්චයකාරතුමා

මෙම නඩු තුනෙන් එකක් එකක් පාසා ම ඇපැල් පෙත්සම් ඉදිරිපත් කර ඇත්තේ එකම කරුණක් උඩය. එනම් මේම අධිකරණයෙහි විනිශ්චයකාරවරු තිදෙනෙකු ගෙන් සමන්විත මණ්ඩලයකින් වලපනේ වතුයායේ අධ්‍යක්ෂ එ. වලපනේ ශ්‍රී ලංකා වතුකම්කරු සංගමය, (65 න.නී.වා. 8*), යන නඩුවේදී දෙන ලද තීරණය අනුව යම්කිසි සේවකයෙකුගේ භාර්‍යාව හෝ සේවිකාවකගේ සැමියා රක්ෂාවෙන් අස්වූ කලෙක ඔහුගේ බිරිඳ හෝ ඇගේ සැමියා රක්ෂාවෙන් ඉවත් කිරීම නීත්‍යානුකූල වන බවත් සේවකයා හෝ සේවිකාව සේවායෝජකයා විසින් සේවයෙන් පහකිරීම නිසා තමා සේවයෙන් අස්වූ කල පවා මෙවැනි පියවරක් ගැනීම නීත්‍යානුකූල යැයි තීරණය වී තිබියදී ඉහත සඳහන් නඩු තුනේම වගඋත්තරකරුවන් නැවත රක්ෂාවට ඇතුළත් කර ගැනීමට යයි දෙන ලද නියෝග නීතියේ හැටියට සාවද්‍ය ලෙස සැළකිය හැකි බව ය.

නමුත් මීට ඉහත කල්පනාවට භාජනය නොවූ එක් ප්‍රශ්නයක් මෙහිදී වග-උත්තරකරු වෙනුවෙන් පෙනී සිටි නීතිවේදීන් විසින් විවාද කළ බව සහ එය මාගෙන් ලැබුණු ධෛර්‍යදීමක් නිසා සිදුවූ බව ද මෙහිලා කිව-මනා ය. එම ප්‍රශ්නය නම් (ඉන්දියානු) වතුකම්කරු ආඥා පණතේ (133 වන පරිච්ඡේදයේ) 23 වන ඡේදය ඇත්ත වශයෙන් ම ඉන්දියාවෙන් මෙරටට නො පැමිණි එහෙත් එසේ පැමිණි අයවඑන් ගෙන් පැවැතෙන්නන් වන ලංකාව නිජභූමි කොට ඇති අයටත් අදළ වේද යන්නය.

එහි ''කම්කරුවා'' යන වචනය විග්‍රහ වී ඇත්තේ පහත සඳහන් පරිදි ය.

''කම්කරුවා'' යන්නෙන් අදහස් කරන්නේ (සාමාන්‍ය-යෙන් ඉන්දියානු කුලිකරුවන් ලෙස ගැණෙන) එසේම තම නම වතුයායේ රෙජිස්ටරයේ ඇතුළත්ව ඇති කම්කරුවන් සහ කංකානිවරු වශයෙන් සිටින අය සහ ''තුලිකන්'' (Tulicans) වර්ගයේ යැයි ගිණිය හැකි මුස්ලිම්වරු ය.

මෙම විග්‍රහව දැන් පවත්නා ව්‍යවහාර අනුසාරය සමග සැසඳෙන්නේ නොවේ. එයට හේතුව සේවකයන්ගේ කිසිම ගණයකට අයත් කෙනෙකුට දැන් කුලිකරුවා යන වචනය යෙදෙන්නේවත් යෙදෙන බව හැඟෙන්නේ-වත් නැති නිසාය. නමුත් මෙයින් බාහිරව සලකා බලන විට ආඥා පණත පැනවූ කාලයේදී හෝ වර්තමාන කාලයේ හෝ මෙම විග්‍රහයට අසුවන තැනැත්තන් පිළිබඳව කිසිම සැකයක් ඇතිවීමට අවකාශයක් නො තිබෙන බව කිව යුතු ය. සාමාන්‍ය වශයෙන් ''ඉන්දියානු වතුකම්කරුවන්'' ලෙස හැඳින් වෙන පුද්ගලයන් කොටසක් මෙතෙක් සිටී. මීට කලින් ''ඉන්දියානු කුලිකරුවන් යැයි'' හැඳින්වෙන පුද්ගල විශේෂයක් ද සිටි බව සැබෑය. මේ දෙකොටස අතර වෙනස ඇත්තේ නාමයෙන් පමණක් මිස අර්ථ සාරයෙන් නොවේ. ඇත්ත වශයෙන් කිවහොත් මුදන්නායක එ. සිවඥානසුන්දරම්‡ යන නඩුව වැනි ඇතැම් පාඨයන්හි මෙම පුද්ගල විශේෂ-යන් වෙනුවෙන් තර්ක කර ඇත්තේ ඔවුන් ලංකාවේ පාලන සංස්ථාවේ 29 වන වගන්තියේ කියවෙන හැටියට එක් පුද්ගල ගණයක් යැ යන බව ය.

133 වන පරිච්ඡේදයේ ඉන්දියානු කුලිකරුවන් යන වචනය ඉන්දියාවෙන් මෙරටට පැමිණි ජනයා පමණක් ඇතුළත් කිරීමට යොදන ලද්දක් ය යන්න ගැන සලකා ගැනීමට කිසිම සාධකයක් නැත. පළමුවෙන් මා මුලාවට පත් කළේ 132 වන පරිච්ඡේදයේ ඇති ''ඉන්දියා-වෙන් ලංකා තරණය කළ කම්කරුවා'' යන වචනයෙහි විග්‍රහවය. මෙම විග්‍රහව සත්‍ය වශයෙන් ම ඉන්දියාවෙන් ලංකාවට පැමිණි සේවකයින්ට යෙදෙන බව පැහැදිළිව පෙනේ. නමුත් පසුව පැනවී ඇති ආඥා පණතෙන් ලංකාව තරණය කළ අය පිළිබඳවත් ඉන්දියාවෙන් ලංකාවට ආ අයගේ ප්‍රථම රක්ෂාව පිළිබඳවත් කරුණු පැනවී ඇති නිසා එයින් අදහස් කරන ලද වැඩ කොටසට පළල් නොවන විග්‍රහවක් සෑහෙන අතර එබඳු විග්‍රහවක් අවශ්‍ය ද වන්නේ ය. 132 වන පරිච්ඡේදයේ 2 වන ඡේදයෙන් පැනවී ඇත්තේ එම ආඥා පණත එහි ඇති ක්‍රියා ලිලාව නො ඉක්මවනතාක් කියවිය යුත්තේ 133 වන පරිච්ඡේදයත් සමග ගත් කළ එකම පණතක් වන අයුරිනි. එහෙත් කලින් පැනවුණු 133 වන පරිච්ඡේදයේ ඇති කිසිම පැනවීමක් සීමා කිරීමට එහි අදහසක් ඇති බව නොපෙනේ.

එම නිසා 133 වන පරිච්ඡේදයේ 23 වන ඡේදය ''ඉන්දියානු වතුකම්කරුවන්'' යයි සාමාන්‍යයෙන් ගැනෙන ලංකාව නිජභූමි කොට ඇති අයටත් බල පවත්වන බව මගේ නිගමනයයි.

වලපනේ නඩුවෙහි තීන්දුව අනුව යමින් මෙම නඩු තුනේ එකක් එකක් පාසාම කම්කරු උසාවිය මගින් දී ඇති නියෝග මම මෙයින් නිෂ්ප්‍රභා කරමි. නඩු ගාස්තු ගැන මෙහිදී නියෝගයක් මගෙන් නො කෙරේ.

ඇපැල්වලට ඉඩ දෙන ලදී.

* ස. ල. නි. 64 කා. 30 වෙනි පිට. ‡ 53 න. නී. වා. 25

ගරු බස්නායක අග්‍ර විනිශ්චයකාරතුමා සහ ද සිල්වා විනිශ්චයකාරතුමා ඉදිරිපිට.

පෙරේරා සහ තවත් අය එ. එලිසහාමි*

ශ්‍රේ: උ; අංක 267/59—කොළඹ දි: උ: අංක: 7538/පී.
විවාද කළේ සහ තීන්දු කළේ 1961 සැප්තැම්බර් 8 වන ද

සාක්ෂි ආඥා පණතේ, ඡේද 68, 69—බෙදුම් නඩු පණතේ ඡේද 69—බෙදුම් නඩුවක්—අයිතිය සනාථ කිරීමට ඉදිරිපත් කරන ලද ඔප්පුව හොර එකකැයි චෝදනා කිරීම—සහතික කළ සාක්ෂිකරුවන් සහ නොතාරිස් මිය යෑම—එවැනි ඔප්පුවක් සනාථ කළ හැක්කේ කෙසේ ද?

සුදුසු සාධක නැතිව ඔප්පුව සාක්ෂි ලෙස ඇතුලත් කිරීම—නිව්‍යාජ භාවය ගැන දෙස් දක්වා තිබියදී ඉදිරිපත් කිරීමට විරුද්ධතාවය ප්‍රකාශ නොකිරීම—එවැනි සාක්ෂි අනුව උසාවියට ක්‍රියා කළ හැකි ද?

තීන්දුව:— (1) මේ නඩුවට අදාළ ඔප්පුවේ නිව්‍යාජ භාවය ගැන දෙස් දක්වා ඇති හෙයින් සාක්ෂි ආඥා පණතේ නියම කර ඇති අන්දමට එය සනාථ කළ යුතුව තිබුන බව. සහතික කළ සාක්ෂිකරුවන් දෙදෙනාම මිය ගොස් ඇති හෙයින් අඩු ගණනේ එක සාක්ෂිකරුවකුගේ සහතිකය ඔහුගේ අත් අකුරින් බව සහ ඔප්පුව ලියා අත්සන් කර දුන් තැනැත්තාගේ අත්සන ඔහුගේ අත් අකුරින් බව ඔප්පු කිරීමට සාක්ෂි ඉදිරිපත් කළ යුතුව තිබුන බව.

(2) ඔප්පුවක නිව්‍යාජ භාවය ගැන දෙස් දක්වා තිබෙන අවස්ථාවක හෝ ඔප්පුවක් සනාථ කළ යුතු යයි උසාවිය නියෝග කළ අවස්ථාවක හෝ බෙදුම් නඩු පණතේ 69 වැනි ඡේදය බල නොපාන බව.

(3) සාක්ෂිකරුවෙකු විසින් පළමුවෙන්ම ඔප්පුවේ ඇතුලත් දේ ගැන සඳහන් කළ අවස්ථාවේදි ඒ ගැන විරෝධතාවය එදිරි පක්ෂයෙන් ප්‍රකාශ නොකළ නමුත් එම ඔප්පුව සාක්ෂි වශයෙන් ඇතුලත් කර ඒ අනුව උසාවිය ක්‍රියා කළ යුතුව නොතිබුන බව. සාක්ෂි ආඥා පණතේ නියම කර ඇති අන්දමට ඔප්පුවේ නැති කරුණු අනුව උසාවියට ක්‍රියා කළ නොහැකි බව.

අනුගමනය කළේ:— ලිම් යං හොං සහ සමාගම එ. ලම් ෂුං සහ සමාගම, (1928) ඒ.අයි.ආර්. (පී.සී.) 127.

නීතිඥවරු:— රාජනීතිඥ ඇන්. ඊ. වීරසූරිය මහතා, ඩබ්ලිව්. ඩී. ගුණසේකර මහතා සමග, 2 වන සහ 10 වන සිට 12 වන විත්තිකාර-ඇපැල්කරුවන් වෙනුවට.

ටී. බී. දිසානායක මහතා, පැමිණිලිකාර-වගඋත්තරකාරිය වෙනුවෙන්.

ගරු බස්නායක අග්‍ර විනිශ්චයකාරතුමා :

මෙය බෙදුම් නඩුවකි. පැමිණිලිකාරිය ගමගේ පීරිස් පෙරේරාගේ වැන්දඹුව වෙයි. ඇගේ අයිතිය රැඳී ඇත්තේ පී 3 දරණ ඔප්පුව උඩය. අර්නෝලිස්ගේ දරුවන් 7 දෙනාගෙන් 4 දෙනෙකු සහ ඔහුගේ සොහොයුරන් වූ තිදෝරිස් සහ ජේමිස් අඹගහ කුඹුරේ සහ දෙල්ගහ කුඹුරේ ඔවුන්ට අයත් කොටස් මේ ඔප්පුවෙන් ඇගේ සැමියාට විකුණා ඇත. අර්නෝලිස්ගේ දරුවන් වන 10 වන සහ 12 වන විත්තිකරුවන් ඇගේ හිමිකම් පෑමට විරුද්ධවී ඇත. පී 3 දරණ ඔප්පුවේ නිව්‍යාජ භාවය ප්‍රශ්න කරන ඔවුහු එය හොර ඔප්පුවක් බව චෝදනා කරති.

මේ ඔප්පුව සහතික කළ සාක්ෂිකරුවන් ද නොතාරිස් ද මිය ගොස් ඇති බව පොදුවේ පිළිගත් දෙයකි. නඩු-විභාගය ආරම්භයේදී ම මතු වූ එක ප්‍රශ්නයක් නම් පී 3 දරණ ඔප්පුවේ නිව්‍යාජ භාවය ය. මාකස් පෙරේරාගේ

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 65 වෙනි කා., 59 වෙනි පිට බලනු.

සාක්ෂිය අනුව ක්‍රියා කළ උගත් දිස්ත්‍රික් නඩුකාරතුමා එය නිර්‍ව්‍යාජ බව පිළිගත්තේ ය. මාකස් පෙරේරාගේ සාක්ෂිය මෙසේ ය :—

". . . පොඩිනෝනා සහ අනිත් අය පීරිස්ට ඔප්පුව ලියා අත්සන් කර දුන් අවස්ථාව මම දනිමි. ඒ ඔප්පුව අත්සන් කරනු ලැබුවේ පොඩිනෝනාගේ නිවසේ දීය. පොඩිනෝනා අර්නෝලිස්ගේ බිරිඳ වූවාය. මේ ඔප්පුව ලියා අත්සන් කළ නොතාරිස් ඩබ්ලිව්. කොරනේලිස් සිල්වා ය. ඔහු දැන් මිය ගොස් ය. මම කිට්ටුව පදිංචි වී සිටින බැවින් මේ අය සමග ලහින් ආශ්‍රය කරමි. මේ ඔප්පුව ලියා අත්සන් කළ මොහොතේදී මම එහි සිටියෙමි. ගේබ්‍රියෙල් සහ ආරොන් පෙරේරා සාක්ෂිකරුවන් වශයෙන් ඔප්පුව අත්සන් කළහ. ඔවුන් ද දැන් මිය ගොස් ඇත. මම ඔවුන්ගේ මරණ වලට ගියෙමි. ඔවුන් ගෙන් එක් අයෙක් මෑතක දී බෝම්බයක් පිපිරීම නිසා මිය ගියේ ය. භය දෙනෙකු හෝ අට දෙනෙකු ලහ සිටිය නමුත් ඔප්පුව අත්සන් කළේ කවුරු දැයි හරියටම කීමට මට බැරිය. ජේමිස් සහ තිදෝරිස් ද, 10 වැනි විත්තිකාර නිකොලස් ද, 11 වැනි විත්තිකාර බෙලිනිස් ද, කිරක්කා නමැත්තියක් ද, 10 වැනි විත්තිකරුගේ මව පොඩිනෝනා ද එහි සිටියහ."

මෙ සාක්ෂියෙන් සාක්ෂි ආඥා පණතේ අවශ්‍යතාවයන් පිරිමැසෙන්නේ නැති බව ඇපැල්කරුවන්ගේ උගත් නීතිඥවරුන් විසින් පවසා ඇත. නඩුවට අදල වන්නේ 68 වන සහ 69 වැනි ඡේදයන් ය. ඒවා මෙසේ ය :—

" 68. යම් ලියවිල්ලක් සහතික කිරීම නීතියෙන් අවශ්‍ය වේ නම්, උසාවියේ නියෝගයට භාජන කළ හැකි, සාක්ෂි දීමට පුළුවන් කමක් ඇති, ජීවතුන් අතර සිටින සහතික කළ සාක්ෂිකරුවන් ගෙන් අඩු ගණනේ එකෙකු කැඳවා ලියා අස්සන් කර දීම සනාථ කරන තුරු එම ලියවිල්ල සාක්ෂි වශයෙන් පාවිච්චි නො කළ යුතු ය.

" 69. එවැනි සහතික කළ සාක්ෂිකරුවෙකු සොයා ගැනීමට බැරි නම් හෝ එම ලියවිල්ල මහා බ්‍රිතාන්‍ය සහ උතුරු අයර්ලන්ත එක්සත් රාජධානියේ දී ලියා අත්සන් කර දුන් එකක් නම් හෝ අඩු ගණනේ එක සාක්ෂිකරුවෙකුවත් ඔහුගේ අත් අකුරින් සහතික කළ බව ද ලියවිල්ල ලියා අත්සන් කර දුන් තැනැත්තාගේ අත්සන ඔහුගේ අත් අකුරින් බව ද ඔප්පු කළ යුතු ය."

අදල නඩුවේ ඔප්පුව සහතික කළ සාක්ෂිකරුවන් දෙදෙනාම මිය ගොස් ඇති හෙයින් අඩු ගණනේ එක සාක්ෂිකරුවෙකුවත් ඔහුගේ අත් අකුරින් සහතික කළ බව ද එය ලියා අත්සන්කර දුන් තැනැත්තාගේ අත්සන ඇගේ අත් අකුරින් බව ද ඔප්පු කිරීමට සාක්ෂි තිබිය යුතු ය. පී 3 දරණ ඔප්පුව සහතික කළ එක සාක්ෂිකරුවකුගේ සහතිකය ඔහුගේ අත් අකුරින් බව සහ ලියවිල්ල ලියා අත්සන් කර දුන් තැනැත්තාගේ අත්සන ඒ තැනැත්තාගේ අත් අකුරින් බව මාකස් පෙරේරා පවසා නැත. ඔහුගේ සාක්ෂියෙන් ඒ බව ඔප්පුවන්නේ ද නැත. පී 3 දරණ ලියවිල්ලේ නිර්‍ව්‍යාජතාවය ගැන දෙස් දක්වා ඇති හෙයින් එය නියමිත අන්දමට සනාථ නොකර සාක්ෂි වශයෙන් පාවිච්චි කළ යුතුව තිබුනේ නැත. ඔප්පුවක නිර්‍ව්‍යාජතාවය ගැන දෙස් දක්වා තිබෙන අවස්ථාවක හෝ ඔප්පුවක් සනාථ කළ යුතු යයි උසාවිය නියෝග කළ අවස්ථාවක හෝ බෙදුම් නඩු පණතේ 69 වැනි ඡේදය බල නොපාන හෙයින් ඒ ඡේදයෙන් මේ නඩුවට ප්‍රයෝජනයක් නැත. සාක්ෂිකරු විසින් පළමුවෙන්ම ලියවිල්ලේ ඇතුලත් දේ ගැන සඳහන් කළ අවස්ථාවේ දී ඊට විරෝධතාවය ප්‍රකාශ නොකළ නමුත් එහි නිර්‍ව්‍යාජතාවය ගැන දෙස් දක්වා ඇති පමණින් විරෝධතාවය ප්‍රකාශ කළත් නැතත් එය නියම අන්දමට සනාථ කිරීම අවශ්‍ය වී තිබුනි. සාක්ෂි ආඥා පණතේ නියමවී ඇති අන්දමට ඔප්පුව නැති කරුණු අනුව උසාවියකට ක්‍රියා කළ නොහැකිය, ((1928) ඒ.අයි.ආර්. (රාජාධිකරණය) 127).

මේ හෙයින් මුල් තීන්දු ප්‍රකාශය ඉවත ලන අතර සනාථ නොකරන ලද පී 3 දරණ ඔප්පුව සම්බන්ධ නොකර පාර්ශවකරුවන්ගේ අයිතිවාසිකම් ගැන තීන්දු කිරීම සඳහා මේ නඩුව යළිත් පහළ උසාවියට යවන ලෙස අපි නියෝග කරමු.

විරුඩකරුවන්ගේ කොටස් කාලසීමාව අනුව භුක්ති විඳීම නිසා පිරිස් පෙරේරාට අයත් යැයි උගත් දිස්ත්‍රික් නඩුකාරතුමා විසින් නිගමණය කර ඇති නඩු තීන්දුවේ කොටස ද අපි ඉවත ලමු.

පැමිණිලිකාරිය විසින් ගෙවිය යුතු ඇපැල් ගාස්තු විත්තිකරුවන්ට අයත් විය යුතු ය.

ද සිල්වා විනිශ්චයකාරතුමා:

මම එකඟ වෙමි.

ඇපෑලට ඉඩ දෙන ලදී.

ගරු හේරත් විනිශ්චයකාරතුමා ඉදිරිපිට

ඕදිරිස් අප්පුහාමි එ. උම්බිච්චි*

ශ්‍රේෂ්ඨාධිකරණයේ අංකය 14—කම්කරු උසාවියේ නඩු අංක 4/9559.

විවාද සහ තීන්දු කළ දිනය : 1963 අප්‍රියෙල් 1.

කාර්මික ආරාවුල් පණතේ 37 වැනි වගන්තිය—එම වගන්තියේ සඳහන් කුමන පියවරකට හෝ අදළ ගාස්තු—අඩිය—සහතික නොකරන ලද එහෙත් නඩුවාතාවෙන් මතුවී පෙනෙන නීති ප්‍රශ්න—ඒ ගැන කරුණු ගෙනහැර දැක්වීමට ශ්‍රේෂ්ඨාධිකරණය ඉඩදේ ද?

මියගිය කෙනෙකුට විරුඬව කම්කරු උසාවියකට ඉදිරිපත් කරන ලද ඉල්ලීම—එහි බලශූන්‍යතාවය.

තීන්දුව:— (1) නඩුවාතාවෙහි සඳහන් කරුණුවලින් මතුවී පෙනෙන නීති ප්‍රශ්නයක් සහතික නොකරන ලද්දේ වුවද ඇපැල ගැන කරුණු ඉදිරිපත් කරන අවස්ථාවේදී තර්ක කිරීමට ශ්‍රේෂ්ඨාධිකරණය අවසර දියයුතුයි.

(2) කාර්මික ආරාවුල් පණතේ (37 වැනි පරිච්ඡේදය), 37 වැනි වගන්තියේ සඳහන් වන (ඉහත කී) වගන්තිය තේරුම්ගත යුත්තේ එය අතුරු පියවරක් පිළිබඳ ව පමණක් නොව ප්‍රධාන ඉල්ලීම අරභයා නියෝග කෙරෙන අවසාන ගාස්තුව පිළිබඳ ව ද (කම්කරු උසාවියට) අධිකරණ බලයක් ලබා දී ඇති වගයෙනි.

(3) මියගිය තැනැත්තෙකුට විරුඬව සහනයක් පතා කම්කරු උසාවියකට ඉදිරිපත් කළ ඉල්ලීමක් බලශූන්‍ය ඉල්ලීමකි. ඒ පිළිබඳව (කම්කරු උසාවියේ) සභාපතිවරයා විසින් කරන ලද කුමන නියෝගයක් වුවද අධිකරණ බලයක් නොමැතිව කරන ලද්දකි.

නීතිඥවරු:— ඩී. ඇස්. විජේසිංහ මහතා, ඉල්ලුම්කාර-ඇපැල්කරු වෙනුවෙන්.

ඇම්. ටී. ඇම්. සිවර්දීන් මහතා, ඇන්. ඇම්. ඇස්. ජයවික්‍රම මහතා සමග, සේවා යෝජක වගඋත්තරකරු වෙනුවෙන්.

ගරු හේරත් විනිශ්චයකාරතුමා :

මෙම නඩුවෙහි ඉල්ලුම්කාර-ඇපැල්කරු විසින් පී. බී. උම්බිච්චිට විරුඬව කම්කරු උසාවියට ඉල්ලීමක් ඉදිරිපත් කරන ලදී. එම උසාවියේ සභාපතිවරයා නඩුගාස්තුව වශයෙන් රුපියල් 105/- ක් වගඋත්තරකරුට ගෙවන මෙන් ඉල්ලුම්කරුට නියම කරමින් ඉල්ලුම්කරුගේ ඉල්ලීම ප්‍රතික්ෂේප කළේය.

ඉල්ලුම්කාර ඇපැල්කරු වෙනුවෙන් උගත් අධිනීතිඥතුමා විසින් නීති ප්‍රශ්න දෙකක් උඩ ඇපැල විවාද කරන ලදී. එයින් එකක් සහතික කරන ලද නීති ප්‍රශ්නයකි. දෙවැන්න සහතික කරන ලද්දේ නොවුවද නඩුවාතාවෙන් මතුවී පෙනී යන එකකි. එසේ නඩුවාතාවෙහි සඳහන් කරුණුවලින් උද්ගත වෙන (නීති) ප්‍රශ්නයක් සහතික නොකරන ලද්දේ වුවද විවාද කිරීමට ශ්‍රේෂ්ඨාධිකරණය අවසර දිය යුතුය යනු මගේ අදහසයි.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 65 වෙනි කා., 66 වෙනි පිට බලනු.

"නිරවුල්කරුවෙකු (Arbitrator) හෝ කාර්මික උසාවියක් හෝ ඉදිරියේ ගනු ලබන කුමන පියවරකට වුවද අදළ ගාස්තු, මෙම පණත යටතේ පැනවෙන රීති යටතේ, එවැනි නිරවුල්කරුගේ හෝ උසාවියේ අභිමතය පරිදි තීරණය කරනු ලැබේ යයි" වශයෙන් කාර්මික ආරවුල් පණතේ (37 වන පරිච්ඡේදය), 37 වන වගන්තියේ සඳහන් වාක්‍යබණ්ඩයේ අර්ථකථනය මත පළමු වන නීතිප්‍රශ්නය රැඳී ඇත්තේ ය. 1957 අංක 67 දරණ සංශෝධන පණතින් ඉහත සඳහන් විධානයට (Provision) කම්කරු උසාවියේ සභාපතිවරයා ද ඇතුළත් වේ.

(ඉහතකී වාක්‍යබණ්ඩයේ) "අදළ" (Incidental) යන වචනය යෙදී ඇත්තේ විනිශ්චයට පාත්‍රවූ කාරණය හෝ පියවර සම්බන්ධයෙන් හෝ නොව, ඊට සම්බන්ධ වූ "අතුරු" හෝ අදළ කරුණක් සම්බන්ධයෙනැයි විජේසිංහ මහතා තර්ක කරයි. 1957 සමස්ත ඉන්දියා වාර්තාවේ (ඒ.අයි.ආර්., (1957) ඇස්.සී. 276) ශ්‍රේෂ්ඨාධිකරණ අංක 276 යේ නඩු තීන්දුව ඒ සම්බන්ධයෙන් ගෙනහැර දක්වන ඔහු අතුරු පියවරක් පිළිබඳ ගාස්තු ප්‍රධාන කාරණය පිළිබඳ කාරණයෙන් වෙන්කොට සැලකිය යුතු බව කියයි. ගැලපීම අතින් අපේ වගන්තියට වඩා ඉන්දියානු වගන්තිය වෙනස් වන්නේ ය. (විනිශ්චය මණ්ඩලයක් ඉදිරියේ ගනු ලබන "පියවර පිළිබඳ ගාස්තු" යනුවෙන් ඉන්දියානු වගන්තියේ සඳහන් වීම වනාහී ඉන්දියාවේ ව්‍යවස්ථාදායක මණ්ඩලය විසින් දෙයාකාරයක "ගාස්තු" ගැන හැඟීමක් ඇතිව සිටි බව පැහැදිළි වන්නේ ය. එනම්: ප්‍රධාන කාරණා පිළිබඳ ගාස්තු සහ අතුරු පියවර පිළිබඳ ගාස්තු වශයෙනි. කුමන හේතුවක් නිසා හෝ අපේ වගන්තියෙන් කියවෙනුයේ ප්‍රධාන කාරණය පිළිබඳ ගාස්තු ගැන පමණෙකි. සිය අභිමතය අනුව ප්‍රධාන කාරණය පිළිබඳව ගාස්තු නියම කිරීමට බලයක් හෝ අයිතියක් දී නැතැයි ද එහෙත් අතුරු පියවරක් ගැන අභිමතය පරිදි ගාස්තු නියම කිරීම සඳහා පමණක් කම්කරු උසාවියක සභාපතිවරයෙකුට ව්‍යවස්ථාදායක මණ්ඩලය විසින් බලය දී ඇතැයි කියා පිළිගැනීම අසීරුය. එහෙයින් මගේ අදහසේ හැටියට අපේ වාක්‍යබණ්ඩයට අනුව ප්‍රධාන කාරණය පිළිබඳව ගාස්තු නොහොත් පූර්ණ ගාස්තු නියමකිරීමට නීත්‍යානුකූල බලයක් දී ඇති සෙයින් අර්ථනිරූපනය කළ යුතුය.

එසේ හෙයින් පළමුවැනි නීති ප්‍රශ්නය පිළිබඳ අභියාචනය අසාර්ථක වේ. නඩුවාර්තාවෙන් මතුවී පෙනෙන දෙවැනි නීති ප්‍රශ්නය ඉතිරිව ඇත්තේය. මා කලින් සඳහන් කළ පරිදි මේ ඉල්ලුම් පත්‍රය වනාහී පී. බී. උම්බිච්චි නමින් කොළඹ සුප්‍රසිද්ධ වෙළඳ ව්‍යාපාරිකයෙකුව සිටියෙකුට විරුද්ධව ඉදිරිපත් කරනු ලැබුවකි. මෙම ඉල්ලුම් පත්‍රය ඉදිරිපත් කිරීමට බොහෝ කලකට උඩදී—1936 දී— මොහු මියගියේ ය. මෙම ඉල්ලුම් පත්‍රය මියගිය අයෙකුට විරුද්ධව ඉදිරිපත් කර ඇති හෙයින් එය නීත්‍යානුකූල නොවූ (බල ශූන්‍ය) ඉල්ලුම් පත්‍රයකි. එය බල ශූන්‍ය එකක් හෙයින් උසාවියේ සභාපතිවරයා විසින් වෙනත් කිසිම පියවරක් නොගෙන ම ප්‍රතික්ෂේප කළයුතුව තිබිණ. ඒ වෙනුවට, පී. බී. උම්බිච්චි ඇරඹූ ව්‍යාපාරය දැනට කරගෙන යන අය විසින් මෙම ඉල්ලුම් පත්‍රයට විරුද්ධව පියවර ගැනීමේ හේතුව නිසා එය සභාපතිවරයා විසින් සලකා බලනු ලැබ ඇත. එහෙත් මියගිය අයකුට විරුද්ධව ඇති ඉල්ලුම් පත්‍රයක් නීතියේ හැටියට බලයක් නැති එකකි. එහෙයින් එවැනි බල ශූන්‍යභාවයක් (කම්කරු) උසාවිය විසින් බලශූන්‍යභාවයක් වශයෙන් සලකා ක්‍රියා කළ යුතුය.

මෙම කරුණු නිසා, මගේ අදහසේ හැටියට, මෙම බලශූන්‍යතාවය පිළිබඳ තවදුරටත් කටයුතු කිරීමට උසාවියට බලයක් නොමැතිය. සභාපතිවරයාගේ නියමය අධිකරණ බලයක් නොමැතිව කරන ලද්දකි. බලශූන්‍යතාවයකින් පැන නහින අභියාචනයට ඉඩදීමට මට නොහැකි වුව ද ඊනියා වගඋත්තරකරුවෙකුට වාසිවෙන සේ ඇපැල්කරුට විරුද්ධව නියම කරන ලද ගාස්තුව පිළිබඳ නියෝගය බලශූන්‍ය එකක් සේ ප්‍රකාශ කරමින් කරුණු එතෙකින් නිමාවට පත් කරමි.

මෙහි සියලු නියෝග බල ශූන්‍ය ඒවාය යි නිගමනය කරන ලදී.

ඇපැලට ඉඩදී කම්කරු උසාවියේ කළ නියෝග බල ශූන්‍ය යයි නිගමනය කරන ලදී.

ගරු හේරත් විනිශ්චයකාරතුමා හා ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා ඉදිරිපිට

කුලසූරිය එ. ලිසිනෝනා පෙරේරා සහ තවත් අය*

ශ්‍රේෂ්ඨාධිකරණයේ අංකය : 121/62—පානදුරේ දිස්ත්‍රික් උසාවියේ අංකය : 7605.

විවාද කළේ: 1963 දෙසැම්බර් 9 සහ 10 යන දිනයන්හි.
තීන්දු කළේ : 1963 දෙසැම්බර් 10 වෙනි දින.

චැක්පතක්—මුදල් නොගෙවීම නිසා ආපසු හැරි ඒම—ආපසු හැරි ආ බව දැන්වීමට නොහැකිවීම—විනිමය පත්‍ර (Bills of Exchange) ආඥා පණතේ 48, 49 වන ඡේද, නීතිව්‍යවස්ථා ග්‍රන්ථ (82 වන පරිච්ඡේදය).

දෙවන විත්තිකරු විසින් ලියනු ලැබ පළමුවන විත්තිකරු විසින් අත්සනින් අනුමත කොට පවරා දෙන ලද (endorsed) චැක්පතක් වෂී 1960 දෙසැම්බර් මස 6 වන දින ආපසු හැරි ආවේය. මෙම චැක්පත ආපසු හැරි ආ බව පැමිණිලිකාරියට එදම දන්වන ලද නමුත් ඈ එය එසේ හැරි ආ බව වෂී 1961 ජනවාරි 11 වන දින වන තුරු පළමුවන විත්තිකරුට නිවේදනය නොකළාය. පැමිණිලිකාරිය සහ පළමුවන විත්තිකරු යන දෙදෙනාම වාසය කළේ එකම නගරයේ ය.

තීන්දුව:— විනිමය පත්‍ර ආඥා පණතේ 49 (12) (ඒ) ඡේදය අනුව පැමිණිලිකාරිය විසින් විශේෂ කරුණු ඔප්පු කර නොමැති බැවින් පළමුවෙනි විත්තිකාරියට වෂී 1960 දෙසැම්බර් මස 7 වෙනි දින ලැබෙන පරිදි චැක්පත ආපසු හැරි ආ බව නිවේදනය කළ යුතුව හෝ නිවේදනයක් යැවිය යුතුව හෝ තිබේ. පැමිණිලිකාරිය විසින් මෙසේ නොකරණ ලද නිසා පළමුවන විත්තිකරුට යථා පරිදි නිවේදනයක් ලැබී නොතිබීමේ හේතුවෙන් පැමිණිලිකාරිය විසින් පළමුවන විත්තිකරුට විරුඩව දැමූ නඩුව නිෂ්ප්‍රභා කළ යුතු ය.

නීතිඥවරු:— සී. රෙන්ගනාදන් මහතා, ආර්. තිලකරත්න මහතා සමග, පළමුවෙනි විත්තිකාර-ඇපැල්කරු වෙනුවෙන්.

සිසිල් ද ඇස්. විජේරත්න මහතා, පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්.

සිව රාජරත්නම් මහතා, දෙවැනි විත්තිකාර-ඇපැල්කරු වෙනුවෙන්.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා :

මෙම නඩුව පළමුවෙනි විත්තිකරු විසින් තමාට අනුමැතිය පිණිස අත්සන් කොට දෙන ලද චැක්පතක් අරභයා පැමිණිලිකාරිය විසින් දමන ලද්දකි.

මෙය වෂී 1960 සැප්තැම්බර මස 7 වෙනි දින පානදුරේ ලංකා බැංකුවට ඉදිරිපත් කිරීමට ලියන ලද චැක්පතක් බවත් එහි පිටුපස ''ඉදිරිපත් කළ යුත්තේ 7.10.60 වන දිනය'' යන සටහන තිබෙන බවත් පෙනීයනසේ ය. පානදුරයේ නගරාසන්න අනිත් නගරය වන වාද්දුවේ පදිංචිකරුවන් හැටියට මේ චැක්පත ලියන ලද තැනැත්තා වන දෙවැනි විත්තිකරුත් අනුමැතිය පිණිස අත්සන් කරන ලද පළමුවැනි විත්තිකරුත්, පැමිණිලිකරුත් යන සියල්ලම පෙනේ. පැමිණිලිකරු විසින් චැක්පත එහි අනුමැතිය පිණිස තම අත්සන තබා දෙන ලදුව ඩී. ජේ. පෙරේරා නැමැත්තෙක් එය මුදල් ගෙවීම පිණිස වෂී 1960 දෙසැම්බර මස 6 වෙනි දින බැංකුවට ඉදිරිපත් කළේය. එහෙත් එය ''ලියනු ලද තැනැත්තාගෙන් විමසනු'' යන සටහන ඇතිව මාරු නොවී ආපසු ආවේය. දෙසැම්බර මස 6 වෙනි දිනම ඩී. ජේ. පෙරේරා මහතා මෙම චැක් එක ගරු නොකිරීමෙන් මාරු නොවී හැරි ආ බව පැමිණිලිකරුට දැන්විය. පැමිණිලිකාරිය විසින් දෙන ලද සාක්ෂියෙහිදී මෙය තමාට දෙසැම්බර මස 6 වෙනි දින රාත්‍රියේ කියන ලද බව ඈ ප්‍රකාශ කළාය. නමුත් චැක්පතක් මාරු නොවී හැරි ආ විට එය අනුමතිය අත්සන් තැබූ තැනැත්තාට ද ඒ බව දැනුම් දිය යුතු ය. විනිමය පත්‍ර (Bills of Exchange) ආඥා පණතේ 48 වන ඡේදය බලන්න—පළමුවන විත්තිකරුට මෙම චැක්පත මාරු නොවී හැරි ආ බව වෂී 1961 ජනවාරි මස 11 වන දින දන්වන ලදැයි කී පැමිණිලිකාරියගේ සාක්ෂිය කෙතෙකුට

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 65 වෙනි කා., 73 වෙනි පිට බලනු.

පිළිගත හැකි වුවත් ප්‍රශ්නය මතුවන්නේ එය වැක්පත මාරු නොවී ආ බවට දියයුතු සුදුසු නිවේදනයක් ද නැද්ද යන්න ගැනය.

විනිමය පත්‍ර ආඥා පණතේ (82 වන පරිච්ඡේදය) 49 වන ඡේදයේ 12 වන උපඡේදයෙන් පහත සඳහන් පරිදි පලවේ.

"වැක්පතක් හෝ මුදල් පිණිස මාරුකල හැකි වෙනත් ගණුදෙනු පතක් මාරු නොවී හැරී ආ කෙනෙහිම ඒ බව දැනුම් දීම මැනවි. එ මතුද නොව ඉන්පසු සැලකිය යුතු කාල සීමාවක් ඇතුලත එය දැනුම්දීම අවශ්‍යය.

විශේෂ කරුණු ඉදිරිපත්වී නැති අවස්ථාවක පහත සඳහන් කරුණු අනුව එය නොදී ඇත්නම් එම නිවේදනය සැලකිය යුතු කාල සීමාවක් ඇතුලත දී ඇති බව නො සැලකේ. එනම්—

(ඒ) නිවේදනය කරන තැනැත්තා සහ එය ලබන තැනැත්තා දෙකම ස්ථානයක නිවාසී අය නම් එම නිවේදනය වැක්පත මාරු නොවී ආ දිනට පසු දින එය ලැබිය යුත්තාට ලැබෙන සේ එක්කෝ දිය යුතු ය. නැත්නම් යැවිය යුතුය."

මා ඉහත පෙන්වා දී ඇති අයුරු මෙහි පැමිණිලිකාරිය ද පළමුවන විත්තිකරු ද එකම ස්ථානයක පදිංචිව ඇති නමුත් වැක්පත මාරු නොවී ආ බව නිවේදනය කොට ඇත්තේ මසකට පසුවය. මෙසේ මාරු නොවීම පිළිබඳ නිවේදනය දීමෙන් ඇතිවූ ප්‍රමාදය සිදුවූයේ විශේෂ කරුණු උද්ගත වූ නිසා බව අපට අවබෝධ කිරීමට පරිශ්‍රමයක් දරන ලදී. එහිදී සඳහන් විශේෂ කරුණ නම් පැමිණිලිකාරිය විසින් තමා ඉන්දියාවට ගියා යයි කියන වඳනා ගමනක නිරත වීම ය. ඇ වෂී 1961 ජනවාරි මස 10 වන දින පෙරලා පැමිණි බවත් වැක්පත මාරු නොවී මේ නිවේදනය 11 වන දින දෙන ලද බවත් සැලවිය. ඇ මෙම වඳනා ගමන පිටත් වී ගියේ කවද ද යන්න ගැන සාක්ෂි නොමැත. එම නිසා මෙම නඩුවෙහි විශේෂ කරුණු උද්ගත වී ඇතැයි අපට නිගමනයට බැසිය නො හැක. මෙහිදී වැක්පත මාරු නොවී ආ බව කියන නිවේදනය දිය යුතුව තිබුණේ එසේ නැතහොත් යැවිය යුතුව තිබුණේ එය පළමුවන විත්තිකරුට දෙසැම්බර 7 වන දිනට ලැබීමට කල්වේලා ඇති වය. මේ නිසා වැක් පත මාරු නොවී පැමිණි බව තත්කාරයෙන් නිවේදනය නොකළ බව තීරණය කිරීමට අපට සිදුවේ.

ඒ බැවින් අපි උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමාගේ නඩු තීන්දුව ඉවත දමමු. මෙම උසාවියේ ද පහල උසාවියේ ද ගාස්තුවට යටත් කොට පැමිණිලිකාරියගේ නඩුව ද නිෂ්ප්‍රභා කරමු. නඩු ගාස්තුව පැමිණිලිකාර-වගඋත්තරකරු විසින් පළමුවන විත්තිකාර-ඇපැල්කරුට ගෙවිය යුතු ය.

ගරු හේරත් විනිශ්චයකාරතුමා :

මම එකඟවෙමි.

ඇපැලට ඉඩ දෙන ලදී.

ගරු සන්සෝනි විනිශ්චයකාරතුමා ඉදිරිපිට

ඇල්. සී. එච්. පීරිස් එ. සවදේශීය ආදායම් කොමසාරිස්තැන, කොළඹ*

ශ්‍රේෂ්ඨාධිකරණයේ නෝ: අංක: 596/63—කළුතර මහේස්ත්‍රාත් උසාවිය, අංක: 47649.
අංක: 390/63 දරණ ඉල්ලුම් පත්‍රය සමග.

විවාද කළේ : 29 නොවැම්බර්, 1963.
තීන්දු කළේ : 9 දෙසැම්බර්, 1963.

ආදායම් බදු ආඥා පණතේ—64 (2) (ඒ), 64 (2) (බී), 65, 68 (1) සහ 80 වන ඡේද—පිළිවෙලින් වෂී තුනක් ගැන ඇපැල් කරු එවූ ආදායම් රපෝර්තු පිළිගෙන ඒ අනුව තක්සේරු කිරීම—ඉන්පසු ඒ අවුරුදු තුන ගැනම වැරදි ඡේදයක් යටතේ ක්‍රියා කරණ විලාශයෙන් අතිරේක තක්සේරුවක් කිරීම—මෙසේ කිරීම නිසා 80 වන ඡේදය යටතේ මහේස්ත්‍රාත්වරයාට දුන් සහතික පත්‍රයක් බල ශූන්‍ය බවට පත්වේ ද යන්න—එබඳු අතිරේක තක්සේරුවකට විරුද්ධව ඇපැල් කරු විසින් ඇපැල් නොගෙන තිබීම—උපකොමසාරිස්වරයාගේ තක්සේරු කිරීම නීතිවිරෝධී යයි ඇපැල් කරු විසින් දක්වන ලද විරෝධය ගැන විභාග කොට තීන්දුවක් දීමට මහේස්ත්‍රාත්තුමාට ආඥා බලය තිබේ ද යන්න.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 65 වෙනි කා., 81 වෙනි පිට බලනු.

සඩදේශීය ආදයම් බදු ආඥා පණතේ 80 වන ඡේදය යටතේ සඩදේශීය ආදයම් උපකොමසාරිස් තැන විසින් මහේස්ත්‍රාත්වරයාට ඉදිරිපත් කළ සහතික පත්‍රයක් අනුව එහි සඳහන් පරිදි ඇපැල් කරු විසින් තමාගෙන් අයකර ගත යුතු ආදයම් බද්ද වශයෙන් රුපියල් 254,745/- ක් නො ගෙවා පැහැර හැරීමට හේතු දක්වන ලෙස දන්වන ලදී.

පරීක්ෂණයකින් පසු 85 වන ඡේදයට අනුව ඇපැල් කරුට තමා විසින් ගෙවිය යුතු මුදල දඩ ගසන ලදින් එය නො ගෙවුවොත් වැඩ නැතිව හය මාසයක සිරදඬුවමක් ද නියම කරණ ලදී. ඉන් පසු ඇපැල් පෙත්සමක් ඉදිරිපත් කළ ඔහු එම තීරණය පරිශෝධනය කිරීමට ද ආයාචනා කරමින් පෙත්සමක් ඉදිරිපත් කොට තිබේ.

පිළිවෙලින් වෂී තුනක්ම ඇපැල් කරුගේ ආදයම කලින් තක්සේරු කරණ ලද බව පරීක්ෂණයේදී අනාවරණය විය. අර්බුදයට භාජනය වී ඇත්තේ ඒ වෂී තුන පිළිබඳව ඇපැල් කරුගේ ආදයම උපකොමසාරිස්වරයා විසින් අතිරේක ලෙස තක්සේරු කොට 64 (2) (බී) ඡේදයට අනුව ක්‍රියා කළසේ සැලකෙන හැටියට ඇපැල්කරුට නිවේදනය භාරදීම නීත්‍යානුකූල ද නැද්ද යන්න ය.

තීන්දුව:— (1) ආදයම් රජෝර්තුව පිළිගෙන 64 (2) (ඒ) ඡේදයට අනුව තක්සේරුකර තිබීම නිසා උපකොමසාරිස්වරයා යළිත් 64 (2) (බී) ඡේදයට අනුව ක්‍රියා කරනසේ සැලකෙන හැටියට කටයුතු කර තිබීම වරද සහිතය.

(2) (ඒ) උපකොමසාරිස්වරයා වරද කර ඇත්තේ තමා කෙරෙහි පැවරී ඇති ආඥා බලයක් ක්‍රියාවෙහි යෙදවීමේ දී නිසා ඒ වරදේ හේතුවෙන් 80 වන ඡේදය යටතේ දෙන ලද සහතික පත්‍රය නිර්බල තත්ඛයකට පත් නො කෙරේ.

(බී) එබඳු වරදක් ආඥා පණතේ 68 (1) දරණ ඡේදයෙහි පිළිසරණින් මග හැරේ.

(සී) තමා පිළිබඳව කරණ ලද තක්සේරුව නිසා ඇපැල් කරු තෘප්තියට පත් නොවූයේ නම් කළ යුතුව තිබුනේ ඒ සඳහා ඇපැල් පෙත්සමක් යැවීම ය.

ඇපැල්කරු විසින් ඉදිරිපත් කරණ ලද විරෝධය විනාශ කර තීන්දුවක් දීමට මහේස්ත්‍රාත්වරයාට ආඥා බලයක් නැත.

නීතිඥවරු:— රාජනීතිඥ ඇන්. ර්. විරසූරිය මහතා, ඇන්. ර්. වීරසූරිය (කනිෂ්ඨ) මහතා සමග, චෝදිත-ඇපැල්කරු වෙනුවෙන්.

වී. සී. ගුණතිලක මහතා, රජයේ අධිනීතිඥ, වගඋත්තරකරු වෙනුවෙන්.

ගරු සන්සෝනි විනිශ්චයකාරතුමා,

මෙම නඩුවෙහි (පරිශෝධන තීරණයක් පිළිබඳව ද ආයාචනයක් ඉදිරිපත් කර ඇති) ඇපැල්කරුගෙන් ආදයම් බද්ද ලෙස අයවිය යුතු රු: 254,745/- අය කර ගැනීම පිණිස සඩදේශීය ආදයම් බදු කොමසාරිස්වරයා 188 වන පරිච්ඡේදයෙහි ඇති ආදයම් බදු ආඥාපණතේ 80 (1) ඡේදය යටතේ ක්‍රියා කරමින් මහේස්ත්‍රාත්වරයාට සහතික පතක් ඉදිරිපත් කරන ලදී. මේ අනුව සිතාසි නිකුත් කරන ලද ආදයම් බදු නයකරු මෙම ආදයම් බද්ද අය නො කිරීමට හේතු දක්වා සිටියේ ය.

පරීක්ෂණයකින් පසු ඇපැල්කරුට ආඥා පණතේ 85 වන ඡේදය යටතේ ආදයම් බදු ගෙවිය යුතු ප්‍රමාණයට දඩයක් නියම කරන ලදී. එය නො ගෙවිව හොත් වැඩ නැතිව හයමාසයක සිර දඬුමකට ද ඔහු යටත් විය යුතු බව ද නියෝග කරන ලදී. මෙම නියෝගයට විරුඬව ඇපැල් පෙත්සමක් ඉදිරිපත් කළ ඔහු එම තීන්දුව පරිශෝධනයක් කරන ලෙස ද ඉල්ලීමක් කරන ලදී.

ඇපැල්කරු පිළිබඳව මීට කලින් පිළිවෙලින් අවුරුදු තුනක කාල සීමාවක් තුල තක්සේරු ඉදිරිපත් කර ඇති බව මෙම පරීක්ෂණයේ දී අනාවරණය විය. ඇපැල්කරු පිළිබඳව මෙසේ අතිරේක තක්සේරු තුනක් කොට ඔහුට ඒ අනුව ඒ අවුරුදු තුන පිළිබඳව නිවේදන බාරදීම නීත්‍යානුකූල ද නැද්ද යන්න මෙහි ඇතිවී තිබෙන ප්‍රශ්නය වේ. මෙසේ අතිරේක තක්සේරු කිරීමේදී උපකොමසාරිස්වරයා ඒ එක් තක්සේරුවක් කරන ලද්දේ නීති ග්‍රන්ථ 188 වන පරිච්ඡේදයෙහි 64 (2) (බී) ඡේදයට අනුකූලව යැයි සිතාගනිමින් බව පෙනේ. මේ ඡේදයෙන් යම් කිසි පුද්ගලයෙකු විසින් සම්පාදනය කොට එවන ලද ආදයම් ප්‍රමාණය පිළිගත නොහැකි වූ කලක තක්සේරු කරුවෙකුට එම පුද්ගලයාගේ තක්සේරු කළ හැකි

ආදයම තක්සේරු කිරීමට බලය ලැබේ. එහෙත් ඔහු 64 (2) (බී) ඡේදය යටතේ ක්‍රියා කළ බැව් සිතාගැනීමෙන් මෙහිදී කටයුතු කර තිබීම වැරදිය. ඒ මන්ද? ඔහු විසින් තමා වෙත එවන ලද ආදයම් ප්‍රමාණය පිළිගෙන ඒ අනුව 64 (2) (ඒ) ඡේදය යටතේ තක්සේරුවක් ද කර ඇති බැවිනි. ඔහු විසින් ගත යුතුව තිබුණු නිවැරදි ක්‍රියා මාර්ගය 65 වන ඡේදය යටතේ ක්‍රියා කරමින් කලින් තක්සේරුව නියම සංඛ්‍යාවට වඩා ප්‍රමාණයෙන් අඩුය යන පදනම පිට අතිරේක තක්සේරුවක් කිරීම ය.

උගත් මහේස්ත්‍රාත්වරයා සිතුවේ 65 වන ඡේදය මීට අදළ නොවන තක්සේරුකරුට මේ නඩුවේ කරුණු අනුව 65 (2) ඡේදය අනුව ක්‍රියා කිරීමට හැකිය කියායි. මීට එකඟ නොවිය හැකි බව මම හුදු ගෞරවයෙන් ප්‍රකාශ කරමි. ආඥා පණතේ 80 (1) ඡේදය යටතේ නිකුත් කරන ලද සහතික පත්‍රය උපකොමසාරිස්වරයා කරන ලද වරද නිසා නිර්බල තත්ත්වයකට පත්වේ දැයි යන්න ද කල්පනා කර බැලීම තාමත් ඉතිරිව පවතී. මගේ අදහසේ හැටියට එය එසේ නොවේ. යම් කිසි බලයක් ක්‍රියාවේ යෙදීම එම බලය ප්‍රදානය කරන ලද ආඥා බලයකට ඉදිරිපත් කිරීම මිස එය නිර්බල තත්ත්වයකට පත් කරන ආඥා බලයක් වෙත ඉදිරිපත් කිරීම කළ යුතු විධිමත් ක්‍රියාමාර්ගය හැටියට දැන් තීරණය වී ඇති නීත්‍යානුකූල තත්ත්වයයි. යම් කිසි ලිඛිත නීතියකින් බලයක් නොදෙන ලද කලෙක පවා සමහර නඩු කෙරෙහි මෙම ප්‍රඥප්තිය අදළ වන ලෙස ක්‍රියා කොට ඇති බව එය යම් කිසි නියමිත ක්‍රියාවක් සඳහා සාධක පාඨයක් ලෙස උපුටා දක්වීමෙන් පෙනේ. එහිදී එම බලය ප්‍රදානය කරන ලද තවත් ලිඛිත නීතියක් ද ක්‍රියාත්මකව තිබුණ බව ද පැහැදිළි ය. මොහමඩ් ඩස්ටාජියර් සහිබ එ. තුන්වන අතිරේක ආදයම් බදු නිලධාරියා, (1961) 74 ඇල්. ඩබ්ලිව්. 540, යන නඩුව බලන්න. එපමණක්ද නොව ආඥා පණතේ 68 (1) දරණ ඡේදයෙන් පැනවී ඇත්තේ ''කිසියම් නිවේදනයක් තක්සේරුවක් සහතික පත්‍රයක් හෝ වෙන යම් කිසි ක්‍රියා සම්ප්‍රදයක් මෙම ආඥා පණතේ පැනවීම් වලට අනුව කෙරී ඇතැයි සලකා ගත හැකිසේ පෙනේ නම් එය කළ යුතු නියම ආකාරයෙන් නොකෙරී තිබීම නිසා නිෂ්ප්‍රභා කිරීමට හෝ ශූන්‍ය ලෙස හෝ ශූන්‍ය කළ හැකි ලෙස සැලකීමට හෝ නුපුළුවන් වන අතර එය එහි සාරානුකූලත්ත්වය අනුව හෝ ප්‍රතිඵලය අනුව හෝ එම ආඥා පණතේ අර්ථය හා අදහසට එකඟත්ත්වය අනුව කෙරී ඇත්නම් එහි ඇති යම් කිසි වරදක අඩුලුහුඩුවක හෝ ප්‍රමාදයක් නිසා මගහැරීමක හේතුවෙන් එය නොකෙළෙසෙනු ඇත . . .'' යනුවෙනි. එ බැවින් උපකොමසාරිස්වරයා අතින් සිදුවී ඇති වරද මෙම ඡේදයේ ප්‍රඥප්තියේ සීමාවට අසුවේ.

මෙම නඩුවෙහි ආදයම් බදු මුදල් නොගෙවූ තැනැත්තාට තමා දැක් වූ විරෝධය දැක්වීමට මෙහිදී ඉඩ නොමැති බව දැක්වීමට තවත් හේතුවක් තිබේ. මෙම පණත අනුව යම් තක්සේරුවක් කිරීමට හෝ එසේ තක්සේරු කළ පසු ඒ සම්බන්ධයෙන් ප්‍රශ්න කිරීමට හෝ විශේෂ ක්‍රියා මාර්ගයක් ඇති කොට තිබේ. ඒ අනුව යම් කිසි තක්සේරු කිරීමක් පිළිබඳව සෑහීමකට පත් නොවූ බදු ගෙවන්නෙකු විසින් පණතේ සඳහන් පරිදි බදු අය කරන අධිකාරීන්ට අභියාචනයක් ඉදිරිපත් කොට සහනයක් ලැබීමට ප්‍රෝත්සාහී විය යුතු ය. යම් හෙයකින් අතිරේකව කරන ලද තක්සේරු කිරීම් වලට ඉඩ ඇති බව කීමේදී වැරදි ඡේදයක් උපුටා දක්වා නීතිය පිළිබඳ උපකොමසාරිස්වරයා විසින් වරදක් කරන ලදුව බදු ගෙවන්නාට ඒ හේතුවෙන් තක්සේරුවට විරෝධයක් දැක්විය හැකියයි නොගෙන්නේ නම් ඔහුට ඇත්තේ අභියාචනයක් ඉදිරිපත් කිරීමේ මාර්ගය පමණි. එ බැවින් මෙහිදී තමා වෙත පැවරී ඇති ආඥා බලය ක්‍රියාවෙහි යෙදවීමෙහි ලා උපකොමසාරිස්වරයා වරදක් කර ඇති නමුදු ඔහුගේ කටයුතු ආඥා බලයක් නොමැතිව කරන ලද කටයුතු යයි කීමට නොහැකි බව මම වැඩිදුරටත් සඳහන් කරමි.

80 වන ඡේදයට අනුව තමා ආඥා බලය ක්‍රියාවෙහි යොදවන මහේස්ත්‍රාත්වරයා කරන්නේ යම් කිසි නඩු තීන්දුවක් ක්‍රියාවෙහි යොදවන උසාවියක් ලෙස කටයුතු කිරීම ය. එ හෙයින් ආදයම් බදු මුදල් ගෙවන්නා විසින් ඉදිරිපත් කරන ලද මෙම විශේෂ විරෝධය මේ අවස්ථාවේදී යථා ක්‍රමයෙන් ඉදිරිපත් කළ හැක්කක් නොවේ. එය ඒ ගැන සලකා විභාග කොට තීන්දුවක් දීමට ද මහේස්ත්‍රාත්වරයාට ආඥා බලයක් ද නැත. මෙම උසාවියේ බොහෝ නඩු තීන්දු වලින් පෙන්වා දී ඇති අයුරු මහේස්ත්‍රාත්වරයා ඉදිරිපිට තක්සේරු කරන ලද අයබදු ගෙවන්නෙකුට ඉදිරිපත් කළ හැකි සමහර විරෝධතාවන් ඇති නමුදු මෙය එවැනි විරෝධතාවයක් නොවන බව කිව යුතු ය. උසාවියෙන් ණයකරුවෙකු ලෙස තීන්දුවූ කෙනෙකු ඇල්ලීමට නිකුත් කරන ලද වරෙන්තුවක් විනිසකරු විසින් අත්සන් නොතබා තිබීමේ හේතුවෙන් බල ශූන්‍ය යැයි තීන්දු වූ නියෝජ්‍ය පිස්කල් නිලධාරියා එ. ටිකිරිබණ්ඩා, (1928) 29 න.නී.වා. 443, දරණ නඩුවේ පිළිසරණ වීරසූරිය මහතා විසින් සොයන ලදි. එම නඩුවෙහි ද මෙම නඩුවෙහි ද සමානකමක් නොපෙනේ. ඇත්ත වශයෙන් ම මෙම නඩුවෙහි මහේස්ත්‍රාත්වරයාට ආඥා බලයක් නොතිබේ යයි කියමින් ඉදිරිපත් කෙරෙන තර්කයට හෝ ආඥා පණතේ වැරදි ඡේදයකට අනුව කරන ලද සේ පෙනී යන බැවින් මෙහි අතිරේක තක්සේරු නීත්‍යානුකූල නොවේ යයි ගෙන හැර පාන තර්කයට හෝ එයින් පිටුවහලක් නොලැබේ.

මෙම නඩුවේ ඇපැලක් කිරීමට කරුණු නොතිබුණු නිසා ඇපැල නිෂ්ප්‍රභා කරන මම පරිශෝධන කිරීම් සංඛ්‍යාතව කරන ලද ඉල්වීම ද ඉවත හෙළමි.

ඇපැල නිෂ්ප්‍රභා විය.

ගරු එච්. ඇන්. ජී. ප්‍රනාඳු විනිශ්චයකාරතුමා සහ ටී. ඇස්. ප්‍රනාඳු විනිශ්චයකාරතුමා ඉදිරිපිට

සුධම්න් සිල්වා සහ තව කෙනෙක් එ. සේනහාමි සහ තවත් අය*

ශ්‍රේ: අ: නො: 100 (එප්) /1961—මීගමුවේ දිස්ත්‍රික් උසාවියේ අංකය: 171/එල්.

විවාද කළ දිනය : වෂී 1963 මැයි 15.
තීන්දු කළ දිනය : වෂී 1963 ඔක්තෝම්බර් 30.

පිත කොමිසමක්—සිංහල බසින් ලියවුනු ඔප්පුවක්—''උරුමක්කාර, පොල්මක්, අද්මිනිස්ත්‍රාසි, භාරකාරාදින්'' යන වචන යොදා තිබීම—''Heirs, executors, administrators and assigns'' කියා ඉංග්‍රීසි බසට පෙරළා තිබීම—''භාරකාරාදින්'' යන වචනයට දිය යුතු තේරුම—විද කොමිසමේ නීත්‍යානුකූලතාවය.

ඔප්පුවක සඳහන් වී තිබූ පහත සඳහන් වචන අනුව පිත කොමිසමක් ඇතිවී තිබේ යයි අයිතිවාසිකමක් ඉදිරිපත් වී තිබිනි:—

'' එම නිසා, මෙම ඉඩම දෙන අය වන අපි එය ලබන අය වන කාලිංග තේමිස් නෝනා සහ දිනයාදුරේ අබරං සිල්වා වන අයට එම ඉඩමෙන් නොබෙදූ කොටසක් ද ඉහත සඳහන් රෙගුලාසි වලට යටත්ව ඔවුන් වෙත තබා ගැනීමට සහ භුක්ති විඳීමට අප වෙත ඇති සියළුම අයිතිවාසිකම් ද හිමිකම් ද, සම්බන්ධකම් ද සම්පූර්ණ බලය ඇතිව මෙයින් පවරා දෙන අතර ඔවුන්ගේ ජීවිත කාලයෙන් පසු ඒ සියල්ල ඔවුන්ගේ උරුමක්කාර පොල්මක්කාර, අද්මිනිස්ත්‍රාසි භරකාරාදින්ට අයිතිව ආණ්ඩුවේ රෙගුලාසි වලට යටත්ව එම ඉඩම කිසිම බාධකයක් නැතිව සදකල් ඔවුන් ළඟ තබා ගැනීමට හා භුක්ති විඳීමට බලය ලැබෙන ලෙස ද ඔවුන්ට අභිමත අයුරින් එම ඉඩම ගැන ක්‍රියා මාර්ගයක් ගත හැකි ලෙස ද මෙයින් ලියා පවරා දෙන්නෙමු.''

තීන්දුව:— (1) යොදා ඇති එම වචන පිත කොමිසමක් ඇති කිරීමට ප්‍රමාණවත් නොවේ.

(2) ''භාරකාර'' යන වචනයට එහි සාමාන්‍ය තේරුම වන ''Trustee, bailer, consignee, custodian, warden'' යන වචන වලට දෙන සිංහල තේරුම් යෙදිය නොහැක. එයට හේතුව අවුරුදු 50 ක් පමණ කාලයක්තුල ශ්‍රේෂ්ඨාධිකරණය එම වචනයේ තේරුම ඉංග්‍රීසි භාෂාවේ ''assigns'' යන වචනයට සමාන තේරුමක් වන ''ලියා අත්සන්කර පවරා දෙන්නා'' යන තේරුම නොතාරිස් වරුන්ගේ ව්‍යවහාරයක් ලෙස බව පිළිගෙන තිබීම වේ.

ගරු එච්. ඇන්. ජී. ප්‍රනාඳු විනිශ්චයකාරතුමා :—'' එම නිසා වර්තමානයෙහි අද වැනි දිනක මේ පිළිබඳව මෙයට වෙනස් යෙදීමක් හෝ අර්ථකථනයක් පිළිගතහොත් විරකාලයක සිට නීත්‍යානුකූල යැයි ද තීරණාත්මක යැයි ද පිළිගත් බොහෝ අයිතිවාසිකම් පරිහාසයට ලක්වනු ඇත. තවද සම්පායෝ විනිශ්චයකාරතුමාගේ මතය අනුව එහි සඳහන් කෙරෙන නොතාරිස්වරුන්ගේ වෘත්තිය සම්ප්‍රදය ස්ථාපිත වී තිබෙන්නට ඇත්තේ වෂී 1914 න් ඉහත බොහෝ කාලයක සිට ය. එපමණක් ද නොව ඒ කාලයේදී එම විනිශ්චයකාරතුමාටත් අතීතයේ සිට කෙරිගෙන ආ වෘත්තිය සම්ප්‍රදයක් ලෙස ඒත්තුගිය කරුණක් පිළිබඳ එතුමාට නිරවද්‍ය හැඟීමක් ඇති නොවී යයි සිතීමට අප ඉදිරියේ කිසිම කරුණක් නොමැතිවා පමණක් නොව මතුවට ද ඇති වේ යයි නොසිතිය හැක. මෙම සිංහල වචනයෙහි නියම තේරුම පිළිබඳව සම්පූර්ණ දැනීමක් ඇතිව මෙම මතය පළකරන ලද බව ඉදුරාම පැහැදිලි ය''.

සඳහන් කළ නඩු:— සිල්වා එ. සිල්වා, න.නි.වා. 18 කා. 174 පිට.
සෙනෙවිරත්න එ. මැන්දිස්, න.නි.වා. 65 කා. 169 පිට.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 65 වෙනි කා., 106 වෙනි පිට බලනු.

අනුගමනය නොකළ නඩු:— විලියම් නෝනිස් එ. සයිමන් නෝනිස් සහ තවත් අය, 61 ස. ල. නි. 17 යන නඩුව අනුගමනය නොකරන ලදී.

නීතිඥවරු:— රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා, ඇල්. සි. සෙනෙවිරත්න මහතා සමග, ඇපැල්කරුවන් වෙනුවෙන්.

ඇස්. සී. ඊ. රුදිගු මහතා, වගඋත්තරකරුවන් වෙනුවෙන්.

ගරු එච්. ඇන්. ජී. ප්‍රනාන්දු විනිශ්චයකාරතුමා:

මෙම නඩුවේ පී 3 දමා කරණ කරන ලද නෝ: 16450 දරණ ඔප්පුවට අනුව තේමිස් නෝනා නැමැත්තියක් සහ ඇගේ සහෝදරියන් යම් යම් ඉඩම් කොටස් වලට හිමිකරුවන් වූ මෙම දෙපක්ෂයම පිළිගෙන තිබේ. වෂී 1904 බෙදුම් ඔප්පුවක් මාඟියෙන් එකී පුද්ගලයන් දෙදෙනාට සහ තවත් අයට ඔවුන්ට හිමිව තිබුණ අයිතිවාසිකම් අනුව (සී) දරණ කොටස වෙන් කොට තිබේ. එම බෙදුම් ඔප්පුව ඩී 2 යන්නෙන් සළකුණු කොට තිබේ. මෙම නඩුවෙහි විෂය වස්තුව (Subject matter) වශයෙන් සැලකෙන්නේ එම ඉඩම් කොටසය. තේමිස් නෝනාගේ සහ අබරංගේ දරුවන් වන මෙම නඩුවෙහි පැමිණිලිකරුවෝ වෂී 1896 දී ලියැවී ඇති පී 3 දරණ යටොක්ත ඔප්පුවෙන් පීත කොමිසමක් ඇතිකර තිබේ යයි කියන අතර ඒ අනුව අර්බුදයට භාජනය වී ඇති ඉඩමෙන් තමන්ට 17/20 ක කොටසක් අයිති බව කියා මෙම නඩුව දැමූහ. නමුත් තේමිස් නෝනා සහ අබරං විසින් වෂී 1904 මාර්තු 12 වෙනි දින ලියා පවරා දී ඇති ඔප්පුවකින් එකී 17/20 ඉඩම් කොටස විත්ති කරුවන්ට කලින් සිටි හිමි කරුවන්ට පවරා දී ඇති බව විත්තිකරුවෝ කියා සිටිති. දිස්ත්‍රික් විනිශ්චයකරු විසින් පී3 දරණ ඔප්පුවෙන් පීත කොමිසමක් ඇතිවී තිබේ ය යන්න පිළිගන්නා ලදුව ඒ අනුව කළ ඉල්ලීම එසේ යයි සම්මත කොට පැමිණිලි කරුවන්ගේ වාසියට තීන්දුව දී තිබේ.

වෂී 1896 ලියන ලද පී3 දරණ ඔප්පුවේ මෙයට අදළ කොටස සිංහලෙන් පරිවර්තනය කළ විට මෙසේ දැක්වේ:—

''එම නිසා, මෙම් ඉඩම දෙන අය වන අපි එය ලබන අය වන කාලිංග තේමිස් නෝනා සහ දිනයැදුරේ අබරං සිල්වා වන අයට එම ඉඩමෙන් නොබෙදූ කොටසක් ද ඉහත සඳහන් රෙගුලාසි වලට යටත්ව ඔවුන් වෙත තබාගැනීමට සහ භුක්ති විඳීමට අප වෙත ඇති සියළුම අයිතිවාසිකම් ද හිමිකම් ද, සම්බන්ධකම් ද සම්පූර්ණ බලය ඇතිව මෙයින් පවරා දෙන අතර ඔවුන්ගේ ජීවිත කාලයෙන් පසු ඒ සියල්ල ඔවුන්ගේ උරුමක්කාර පොල්මක්කාර අද්මිනිස්ත්‍රාසිකාරයන්ට සහ ඔවුන් විසින් පවරා දෙන අයට ද ආණ්ඩුවේ රෙගුලාසි වලට යටත්ව එම ඉඩම් කිසිම බාධකයක් නැතිව සදකල් ඔවුන් ළඟ තබාගැනීමට භාභුක්ති විඳීමට බලය ලැබෙන ලෙස ද ඔවුන්ට අභිමත අයුරින් එම ඉඩම ගැන ක්‍රියා මාර්ගයක් ගතහැකි ලෙස ද මෙයින් ලියා පවරා දෙන්නෙමු ''

මේ අයුරින් විස්තර කෙරෙන භාෂා විලාශය එනම්, ''එකී ලබන්නන්ට සහ ඔවුන්ගේ ජීවිත කාලයෙන් පසු ඔවුන්ගේ උරුමක්කාරයන්ට, පොල්මක්කාරයන්ට, අද්මිනිස්ත්‍රාසිකාරයන්ට සහ ඔවුන් විසින් පවරා දෙන අයට ද යන මේ යෙදීම පීත කොමිසමක් ඇති කිරීමට තරම් නොසැහෙන බව මෙම අධිකරණය විසින් නොඑක් තීන්දුවලදී පිළිගෙන ඇති බව මා විසින් මෙහිලා සඳහන් කිරීම අවශ්‍ය යයි නොසිතේ. **සෙනෙවිරත්න එ. මැන්ඩිස්**, (65 න.නි.වා. 169,) යන නඩුවෙහි විරසූරිය විනිශ්චයකාරතුමා විසින් ඇතුළත් කර තිබීම එයට හේතුව ය. මෙම නඩු තීන්දු අනුව ගියහොත් පැමිණිලිකරුගේ මෙම නඩුව අසාර්ථක වන බව පැහැදිළි ය.

නමුත් කෙසේ වෙතත් උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා එහි ඇති සිංහල මූලික යෙදීම වෙනුවට ඔහුගේම පරිවර්තනයක් යොදා තිබේ. එහි ''ඔවුන්ගේ උරුමක්කාර පොල්මක්කාර, අද්මිනිස්ත්‍රාසිකාරයන් සහ ඔවුන් විසින් පවරා දෙනු ලබන්නන්'' යන යෙදීම වෙනුවට එහි ඇත්තේ ''ඔවුන්ගේ උරුමක්කාර පොල්මක්කාර, අද්මිනිස්ත්‍රාසිකාරයන් සහ ඔවුන්ගේ බාරකරුවන් හෝ විශ්වාස භාරය ලබන්නන්'' යනු ය. මෙම පරිවර්තනය පිළිගත් උගත් විනිශ්චයකාරතුමා එයට අනුව යමින් **වීලියම් නෝනිස් එ. සයිමන් නෝනිස් සහ තවත් අය,** (61 සතිපතා ලංකා නීති සංග්‍රහය 17,) යන නඩුවෙහි බස්නායක අග්‍රවිනිශ්චයකාරතුමා විසින් ගන්නා ලද මග ම ගත් බවක් පෙනේ. එම නඩුවෙහි අග්‍රවිනිශ්චයකාරතුමා විසින් ''භාරකාර'' යන සිංහල වචනයට විශ්වාසභාරය දරන්නා, බාරව සිටින්නා, බඳුබාරගත යුතු හෙවත් ලැබිය යුතු තැනැත්තා, රැක බලාගන්නා සහ ආරක්ෂකයා'' යන වචන සපයන ලදී. ඉහත සඳහන් කළ මෑත කාලයක දෙන ලද නඩු තීන්දුවෙහි විරසූරිය විනිශ්චයකාරතුමා විසින් සඳහන් කරනලද්දේ බස්නායක අග්‍රවිනිශ්චයකාරතුමාගේ නඩු තීන්දුව අනුගමනය නො

කළ යුතු ය කියායි. ඒ මතයට මාද එකඟ වීමට ඇති හේතු සඳහන් කිරීම මෙහිදී ප්‍රයෝජනවත් වේ යැයි සිතිය හැක.

සිංහළ බසෙහි ඇති ''භාරකාර'' යන වචනයෙහි නියම තේරුම පිළිබඳ කරුණ වෂී 1914 දී විසඳුණ **සිල්වා එ. සිල්වා**, (18 න.නී.වා. 174,) යන නඩුවෙහි දී සම්පායෝ විනිශ්චයකාරතුමා විසින් සලකා බලන ලදී. එහි එම උගත් විනිශ්චයකාරතුමා විසින් පහත සඳහන් ලෙස ප්‍රකාශ කොට තිබේ :—

''මෙම නඩුව විභාගවන අතර භාරකාරයා යන සිංහල වචනයෙහි තේරුම පවරා දෙන්නා යැයි ඉංග්‍රීසි බසින් ''assign'' යන වචනය යොදා පරිවර්තනය කිරීම නිවැරදි ද යන්න ගැන යම්කිසි ප්‍රශ්නයක් මතුවිය. සාමාන්‍යයෙන් මෙම සිංහල වචනය, බාරව සිටින්නා හෝ බාරකාරයා යන තේරුම් වලට දිස්ත්‍රික් විනිශ්චයකාරතුමා පවසන හැටියට මෙවැනි යෙදීමක දී එය ඇතුළත් වන නමුත් පවරා දෙනු ලබන්නා යන තේරුම ඇති ''assign'' යන ඉංග්‍රීසි වචනයට සමාන යැයි මම සිතමි. ඉඩම් ලියා පවරාදීමේදී ඉංග්‍රීසියෙන් යෙදෙන ''heirs, executors, administrators සහ assigns'' යන වචන වලට සාමාන්‍යයෙන් සිංහලෙන් ලියන විට නොතාරිස්වරු ''උරුමක්කාර, පොල්මක්කාර, අද්මිනිස්ත්‍රාසිකාර, බාරකාරාදීන්'' යන යෙදීම යොදන බව මට කීමට පුළුවන.''

මෙබඳු ප්‍රකාශයන්ගෙන් පහත සඳහන් කරුණු පැහැදිළිවේ :—

(ඒ) අවුරුදු පණහකට පෙර දිස්ත්‍රික් විනිශ්චයකාරවරයෙකු විසින් නිගමනය කරන ලද පරිදි මෙම අධිකරණය ද පිළිගෙන ඇත්තේ මෙම සිංහල වචනයෙහි සාමාන්‍ය තේරුම ''බාරකාරයා හෝ බාරව සිටින්නා'' යන බව ය.

(බී) කෙසේ නමුත් සම්පායෝ විනිශ්චයකාරතුමා එතුමාගේ වෘත්තීය පළපුරුද්ද හා දැනීම අනුව යැයි සළකාගත හැකි ලෙස නොතාරිස්වරු මෙම වචනය ''assigns'' (පවරා දෙනු ලබන්නා) යන ඉංග්‍රීසි වචනය වෙනුවට භාවිතා කරන බව පෙන්වා දී තිබේ.

(සී) මෙම උසාවිය එහි තීන්දුවල පිළිගෙන ඇත්තේ එම වචනයෙහි සාමාන්‍ය තේරුම නොව එයට කළින් තිබුණ නොතාරිස්වරුන්ගේ වෘත්තීය යෙදීම (notarial practice) අනුව එම වචනයට ඇතුළත් වන තේරුමය.

මැතදී දී ඇති අග්‍රවිනිශ්චයකාරතුමාණන්ගේ නඩු තීන්දුවට කලින් සම්පායෝ විනිශ්චයකාරතුමා කරන ලද ප්‍රකාශයන්ට මෙම උසාවිය විරුද්ධවූ බවක් පෙනෙන එකදු නඩුවකදු නැත. අනිත් අතට එම ප්‍රකාශයන් නොතාරිස්වරුන්ට සහ විනිශ්චයකාරවරුන්ට ඔප්පුවලින් මතුවන ඉඩම් පිළිබඳ මතුවන ප්‍රශ්න වලදී යම් යම් අවවාද දීමට සහ එබඳු ප්‍රශ්න විසඳීමට ද මෙම සිංහල වචනය යෙදී ඇති අවස්ථාවන්හි උපකාරී වී තිබේ. යම්කිසි ලියවිල්ලක එක් භාෂාවක යෙදෙන යෙදීමක් පිළිබඳව මෙම උසාවියෙන් තීරණාත්මක ප්‍රකාශයක් කර තිබී දීර්ඝ කාලයක් ඒ පිළිබඳව ප්‍රශ්නයක් මතු නොවූ බැවින් එම නඩු තීන්දුව නිරවද්‍යතාවය සලකා එය කෙරෙහි විශ්වාසය තබා නොයෙකුත් ගණුදෙනු සිදුවී ඇති බවට කිසිම සැකයක් නැත. එම නිසා වර්තමානයෙහි අද වැනි දිනක මේ පිළිබඳව මෙයට වෙනස් යෙදීමක් හෝ අර්ථකථනයක් පිළිගතහොත් චිරකාලයක සිට නීත්‍යානුකූල යැයි ද තීරණාත්මක යැයි ද පිළිගත් බොහෝ අයිතිවාසිකම් පරිහාසයට ලක්වනු ඇත. තවද සම්පායෝ විනිශ්චයකාරතුමාගේ මතය අනුව එහි සඳහන් කෙරෙන නොතාරිස්වරුන්ගේ වෘත්තිය සම්ප්‍රදය ස්ථාපිත වී තිබෙන්නට ඇත්තේ වෂී 1914 න් ඉහත බොහෝ කාලයක සිට ය. එපමණක් ද නොව ඒ කාලයේදී එම විනිශ්චයකාරතුමාටත් අතීතයේ සිට කෙරීගෙන ආ වෘත්තීය සම්ප්‍රදයක් ලෙස ඒත්තුගිය කරුණක් පිළිබඳ එතුමාට නිරවද්‍ය හැඟීමක් ඇති නොවී යයි සිතීමට අප ඉදිරියේ කිසිම කරුණක් නොමැතිවා පමණක් නොව මතුවට ද ඇති වේ යයි නොසිතිය හැක. මෙම සිංහල වචනයෙහි නියම තේරුම පිළිබඳව සම්පූර්ණ දැනීමක් ඇතිව මෙම ඔතය පළ කරන ලද බව ඉඳුරාම පැහැදිළි ය.

ඉහත දක්වා ඇති හේතූන් නිසා මෙම නඩුවෙහි පී3 දමා ලකුණු කරන ලද ඔප්පුවෙන් පිත කොමිසමක් ඇතිවී නැති බව තීරණය කරමි. මෙම ඇපෑලට ඉඩ දෙන මම විත්තිකරුගේ නඩුව උසාවි දෙකේම ගාස්තුවට යටත් කොට නිෂ්ප්‍රභා කරමි.

ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා :

මම එකඟ වෙමි.

ඇපෑලට ඉඩ දී
නඩුව නිෂ්ප්‍රභා කරන ලදී.

ගරු ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා ඉදිරිපිට

මහරැජින එ. දියෝනිස් ජයසුන්දර සහ මෙතියස් පෙරේරා*

ඇප ඉල්ලීමක්

(දෙවන මධ්‍ය දේශ චාරිකාව, 1963—මහනුවර)

ශ්‍රේෂ්ඨාධිකරණයේ අංකය: 55/63—අනුරාධපුර මහේස්ත්‍රාත් උසාවියේ අංකය: 31430.

තීන්දුකල දිනය: 25 නොවැම්බර්, 1963.

ඇප දීම—චෝදිතයකු වෙනුවෙන් කරණ ලද ඉල්ලීමක්—චෝදිතයා පැමිණිලි පක්ෂයේ සාක්ෂිකරුවන්ගෙන් පලිගත හැකි බව සටහන්වී ඇති සාක්ෂි වලින් පෙනීයාම—කුමන්ත්‍රණය කිරීම පිළිබඳ නඩුවකදී එක් චෝදිතයකුට විරුඬව අනිත් අයට විරුඬව ඇති තරම් උග්‍ර කරුණු ඉදිරිපත්වී නැතත් ඇප දිය යුතු ද?

තීන්දුව:— (1) යම් කිසි චෝදිතයකු වෙනුවෙන් කරණ ලද ඇප ඉල්ලීමකදී යම් හෙයකින් එම චෝදිතයා ඇප පිට නිදහස් වුවහොත් සාක්ෂිකරුවන් ගෙන් පලි ගනීය යන සැකය තරමකට හෝ පදනම් කොට ඇති සාක්ෂි ඇතොත් එය එම ඉල්ලීමට ඉඩ නොදීමට සෑහෙන හේතුවකි.

(2) කුමන්ත්‍රණය කිරීම පිළිබඳ නඩුවකදී ඒ නඩුවේ එක් එක් චිත්තිකරුවකු විසින් කරණ ලද කටයුතු කොටස අනිත් අය විසින් කරණ ලද කටයුතු කොටස් වලින් තෝරා බේරා වෙන් කර ගත නොහැකි පරිදි එකට වෙලී පැටලී ඇති නිසා, අනිත් අයට විරුඬව මෙහෙය වූ ඇතැම් කරුණු එක් අයකුට විරුඬව නැතිවූවත් ඔහුත් ඒ අනුව ඇප පිට නිදහස් කිරීම නුසුදුසු ය.

නීතිඥවරු:— අධිනීතිඥ ටී. ඇම්. කේ. යූ. සෙනෙවිරත්න මහතා, රජයේ අධිනීතිඥතැන, රජය වෙනුවෙන්.

අධිනීතිඥ ඇස්. කනගරත්නම් මහතා, ඉල්ලුම්කරුවන් වෙනුවෙන්.

ගරු ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා

මෙය වනාහි ගමරාලලාගේ සූටින් පෙරේරා නැමැත්තෙකු මැරීමට කුමන්ත්‍රණ කරන ලදැයි ද ඒ කුමන්ත්‍රණයට අනුව ඒ තැනැත්තා මරාදමන ලදැයි ද චෝදනා කරන ලද මෙම නඩුවේ චෝදිතයන් දෙදෙනා වෙනුවෙන් ඇප ඉල්ලීමට කරන ලද ආයාචනයකි. මෙම ආයාචනය අධිකරණ ආඥා පණතේ 31 වන ඡේදය යටතේ කරන ලද නිසා රජය විසින් විශේෂ හේතුවක් නොදක්වන කලක සාමාන්‍ය වශයෙන් එයට ඉඩදීමට සතුටුවීම මාගේ අදහස වියයුතුව තිබේ. නමුත් මෙම ඉල්ලීමට පිළිතුරු වශයෙන් රජය විසින් කැකිරාවේ පොලිස් පරීක්ෂක, පැදිවිට මහතාගේ දිවුරුම් පෙත්සමක් ඉදිරිපත් කොට තිබේ. ඒ මහතා මෙම ඉල්ලීමට විරෝධය දක්වමින් වෙනත් කරුණු අතර පහත සඳහන් කරුණු ද ඉදිරිපත් කර ඇත්තේ පළමු වන චිත්තිකරු ජයසුන්දර වෙනුවෙන් යයි සලකා ගත හැක. ඒ කරුණු නම් :—

(1) යම් හෙයකින් චෝදිතයා ඇප පිට නිදහස් කෙරේ නම් සමහර විට ඔහු සෑහවී සිටිනු ඇත. නැවත ඔහු අල්වා ගැනීමට සැළකිය යුතු ගැහැට විඳීමට සිදුවේ.

(2) මියගිය අය මරණයට පත් කරන ලද්දේ ඔහු විසින් පොලිසියට තොරතුරු සපයන ලදැයි කලින් තිබුණු වෛෂයක හේතුවෙනි.

(3) තත්ඛය මෙසේ නිසා චෝදිතයා ඇප පිට නිදහස් කළ හොත් ඔහු මියගිය අයගේ ඥාතීන්ට විරුඬව වැඩි දුරටත් ගරුක අපරාධ කිරීමට සෑම අතින්ම අවකාශ තිබේ.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 65 වෙනි කා., 109 වෙනි පිට බලනු.

(4) ඉහත සඳහන් නඩුවෙහි සාක්ෂිකරුවන්ට විත්තිකරු විසින් අයථා බලපෑම් කිරීමට ද ඉඩ තිබීමට පුළුවන.

චෝදිතයා සැහවී සිටිය හැකැයි ඉදිරිපත් කරන පළමු වන හේතුව පිළිබඳව කියයුත්තේ එබඳු ප්‍රකාශයක් කිරීමට පදනම් කරගත හැකි කිසිවක් නඩු පොතේ සඳහන්වී නැති බවය. මෙම නඩුවෙහි පරීක්ෂණය ඇරඹුණුදුසිට එම චෝදිතයා උසාවියට ඉදිරිපත්වී ඇත්තේ සිර භාරයේ සිටගනයි. මහේස්ත්‍රාත්තුමා විභාගය කරගෙන යන අවස්ථාවේදී මෙම චෝදිතයා සැහවීමට කිසිම ප්‍රයත්නයක් කළ බවට සාක්ෂි නැතැයි රජයේ අධිනීතිඥවරයා ප්‍රකාශ කරයි. නමුත් දෙවන කරුණෙහි යම් කිසි සාරවත් කමක් මට පෙනී යේ. මෙම නඩුවේහි පැමිණිලි පක්ෂය විසින් පෙලඹීමේ හේතු වශයෙන් පෙන්වා ඇත්තේ විත්තිකරුවන් විසින්—අඩු වශයෙන් පළමු වන විත්තිකරුවා විසින් මියගිය අය මෙලොවින් තුරන් කොට ඇත්තේ ඔහු විසින් චෝදිතයා ළඟ බල පත්‍රයක් නොමැති තුවක්කුවක් ඇති බව සහ ඔහු ළඟ නීති විරෝධී ලෙස මත්ද්‍රව්‍ය තිබෙන බවත් පොලිසියට දන්වා ඇති ලෙස ය යන්න ය. එම නිසා යම්හෙයකින් පළමු වන විත්තිකරු ඇප පිට මුදා හැරියොත් ඔහු තමාට විරුද්ධව මහේස්ත්‍රාත් උසාවියේදී සාක්ෂි කියා ඇති විත්තිකරුවන්ට විරුද්ධවත් පළිගැනීමට තැත් කිරීමක් කළ හැකි ය යන සැකය ගොඩනැගීමට යම්කිසි පදනමක් ඇති බව පෙනී යයි. පැමිණිලි පක්ෂය විසින් ශ්‍රේෂ්ඨාධිකරණය ඉදිරිපිටදී මෙම නඩුව ඉදිරිපත් කිරීමට බලාපොරොත්තු වන්නේ ද මෙම සාක්ෂිකරුවන්ගේ සාක්ෂි මත එල්බ ගනිමිනි. එබැවින් පළමු වන චෝදිතයා සම්බන්ධයෙන් ඇප දීමට විරුද්ධව මෙය හොඳ හේතුවක් ලෙස ගත හැකැයි මට හැඟේ.

දෙවන චෝදිතයා පිළිබඳව ඔහු පළමු වන චෝදිතයා සමග මියගිය අයගේ මරණය සිදු කිරීමට කුමන්ත්‍රණය කළේ මන්ද යන්න ගැන සැලකිය යුතු පෙලඹීමේ හේතුවක් රජය විසින් ඉදිරිපත් කොට නැත. කෙසේ හෝ රජයේ අධිනීතිඥතැන අදහස් කරන්නේ ඔහු කුලියට ගත් අපරාධකරුවෙක්ය යන්නය. මීට හේතුව මියගිය අයගේ මරණය සිදුකිරීමට ප්‍රතිඵලයක් ලෙස දෙවන චෝදිතයාගේ අතට යම්කිසි මුදලක් පත්වී යැයි මහේස්ත්‍රාත් උසාවියේ කළ පරීක්ෂණයේ දී සාක්ෂිකරුවන් දෙදෙනෙකු විසින් ම කියා තිබීම ය. මෙම සාක්ෂිය නඩු කොපියේ 25 සහ 26 වන පිටුවල දක්නට ලැබේ. මේ හැරුණු විට මෙය එක් අයකු විසින් කරන ලද කොටස අනිත් අය විසින් කරන ලද කොටස සමග වෙන් වෙන් ව බෙරාගත නොහැකි සේ වෙලී පැටලී ඇති කුමන්ත්‍රණ නඩුවකි. පළමු වන විත්තිකරුට විරුද්ධව ඇති නඩුවෙන් ඉවත් කොට දෙවන විත්තිකරුට විරුද්ධව ඇති නඩුව වෙන් කර ගැනීමට පුළුවනැයි මට නො සිතේ. එම නිසා දෙවන විත්තිකරුට පමණක් ඇප දීම ද කළ නොහැකි බැවින් විත්තිකරුවන් දෙදෙනා වෙනුවෙන් ම කර ඇති මෙම ඉල්ලීම ප්‍රතික්ෂේප කරමි.

ප්‍රතික්ෂේප කරන ලදී.

ගරු අබේසුන්දර විනිශ්චයකාරතුමා ඉදිරිපිට

අප්පුවා එ. කෑගල්ලේ කොවිජනසේවා කොමසාරිස්තුමා*

ග්‍රෙ. අංකය 459/63 ම. ඵ. කෑගල්ල 44842

වාදකලේ සහ තීන්දු කළේ : 1963. 9. 6

කුඹුරු පණත, වගි 1958, නො: 1—ඇපැල්කරුගේ නොපැමිණීම නිසා ඔහු කුඹුරින් ඉවත් කිරීමට නියෝගයක්—එම නියෝගය ඉවත් කිරීමට මහේස්ත්‍රාත්තුමාට ඇති බලය—ඇපැල්කරුගේ ප්‍රමාදය අසනීපයට හේතුව හෙයින් ඇපැලට ඉඩදීම.

1958, නො: 1 දරණ කුඹුරු පණතේ 21 (3) දරණ ඡේදය යටතේ පැවැත්වූ විභාගයට නියම දිනයෙහි ඇපැල්කරුගේ නොපැමිණීම නිසා හෙතෙම කුඹුරින් ඉවත් කිරීමේ නියෝගයක් මහේස්ත්‍රාත්තුමා විසින් කරණ ලදි. තමාගේ අසනීපය නොපැමිණීමට කරුණ වූයෙන්, මහේස්ත්‍රාත්තුමාගේ නියෝගය ඉවත් කරනමෙන් වෛද්‍ය සහතිකයක් ඇතුලුව ඉදිරිපත් කරණ ලද ඉල්ලීම මහේස්ත්‍රාත්තුමා තමාට එසේ කිරීමට බලයක් නැතැයි කියා එය ප්‍රතික්ෂේප කෙළේය.

තීන්දුව:— ඇපැල්කරු නොපැමිණීමට හේතුව ඔහුගේ අසනීපය වූ නිසා, ඔහුගේ නොපැමිණීමට සමාව දිය යුතුයි.

නීතිඥවරු:— යූ. සී. බී. රත්නායක, වගඋත්තර ඇපැල්කරු වෙනුවෙන්.
ඇන්. බී. ඩී. ඇස්. විජේසේකර, රජයේ අධිනීතිඥ කැන, අටෝර්නි ජනරාල්තුමා වෙනුවෙන්.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංගයෙහි 65 වෙනි කා., 109 වෙනි පිට බලනු.

ගරු අබේසුන්දර විනිශ්චයකාරතුමා

කෑගලු දිස්ත්‍රික්කයේ ගොවි•ජන සේවා දෙපාර්තමේන්තුවේ උපකොමසාරිස්තුමා විසින් කෑගල්ලේ මහේස්ත්‍රාත් උසාවියට වෂී 1958, නො: 1 දරණ කුඹුරු පණතේ 21 (1) ඡෙදය යටතේ එවන ලද රපෝර්තුවෙහි විස්තර වන කුඹුරෙන් ඉවත් නො කිරීමට හේතු දක්වන ලෙස කෑගල්ලේ මහේස්ත්‍රාත් තුමා විසින් නියම කරන ලද දිනයෙහි මෙම නඩුවේ ඇපැල්කරු උසාවියට පැමිණ නො සිටියේය. මෙම ඉල්ලීමට ඉඩ දෙමින් මහේස්ත්‍රාත් වරයා එම රපෝර්තුවෙන් ඉල්ලා සිටි පරිදි ඇපැල්කරු එම කුඹුරෙන් ඉවත් කිරීමට නියෝගයක් නිකුත් කළේය. පසු දිනක පැමිණි ඇපැල්කරු වෛද්‍ය සහතිකයක් ඇමුණු දිවුරුම් පෙත්සමක් ඉදිරිපත් කොට තමාගේ නො පැමිණීම අසනීපය නිසා සිදුවූ බව කියමින් යථෝක්ත රපෝර්තුවට අනුව උසාවිය විසින් කරන ලද නියෝගය ඉවත් කරන ලෙස යාඥා කර සිටියේ•ය. තමාගේම නියෝගය ඉවත් කිරීමට තමාට බලය නැතැයි මහේස්ත්‍රාත්වරයා කීය.

ඇපැල්කරුගේ නො පැමිණීම අසනීපයක් නිසා සිදුවූ බැවින් ඔහුගේ ප්‍රමාදයට සමාව දිය යුතු ය. එම නිසා 1963 පෙබරවාරි මස 6 වෙනි දින මහේස්ත්‍රාත්වරයා විසින් දෙන ලද නියෝගය ඉවත හෙලන මම එම ඇපැල්කරුට එකී කුඹුරෙන් තමා ඉවත් නො කිරීමට හේතු පෙන්වීමට තවත් අවසථාවක් දෙන ලෙස දී නියෝග කරමි.

ඇපෑලට ඉඩ දෙන ලදී.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා ඉදිරිපිටි

තේසිවානි එ. තේසිවානියා*

ග්‍රේ: අ: 789/63—බණ්ඩාරවෙල මහේස්ත්‍රාත් උසාවිය, නො: 39301.

වාදකළ සහ තීන්දු කළ දිනය: 21. 2. 1964

නඩත්තු පනත (91 වෙනි පරිච්ඡේදය) 3 වෙනි ඡෙදය—නඩත්තු ඉල්ලන පුරුෂයාට විරුද්ධව පැවරූ නඩුවක්—බිරිඳව භාරගෙන නඩත්තු කිරීමට පුරුෂයාගේ කැමැත්ත දැක්වීම—එය නිව්‍යාජ කැමැත්තක් දැයි කල්පනා කිරීම.

තීන්දුව:— නඩත්තු නඩුවක දී පුරුෂයා තම බිරිඳ නඩත්තු කිරීමට භාර ගැනීමට දැක් වූ කැමැත්ත ප්‍රතික්ෂේප කිරීමට කරුණු සැලකූ බව මහෙස්ත්‍රාත් තුමාගේ තීන්දු ප්‍රකාශයෙන් පෙනී යන්නේ නම් ඒ ගැන විශෙෂයෙන් සඳහන් නොකළත් එම නියෝගය ස්ථිර කිරීමට එය ප්‍රමාණ වේ.

නීතිඥවරු:— ඇම්. කනකරත්නම් මහතා, වගඋත්තරකාර-ඇපැල්කරු වෙනුවෙන්.
කේ. කන්දසාමි මහතා, ඉල්ලුම්කාර-වගඋත්තරකාරිය වෙනුවෙන්.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා

මේ නඩුවේ වගඋත්තරකාර-ඇපැල්කරු වෙනුවෙන් පෙනී සිටින කනකරත්නම් මහතා කරුණු දක්වමින් තම භාය්‍යාව නඩත්තු කිරීමට විත්තිකරු භාරගෙන ඇති නිසා, ඒ භාරගැනීම පිළිගත යුතුව තිබුනු බැව් කියයි. නඩත්තු ආඥා පණතේ—91 වන පරිච්ඡේදය, 3 වන ඡෙදය ගැන ද ඔහු සඳහන් කරයි. එහි ඇතුළත්වී ඇත්තේ මෙසේ ය : ''මෙබඳු තත්ඛයක ඇති තැනැත්තෙකු භාය්‍යාව තමා සමග වාසය කරන්නේ නම් ඇ නඩත්තු කිරීමට භාර ගැනීමට කැමති වුව හොත් එය ප්‍රතික්ෂේප කරමින් භාය්‍යාව දක්වන කරුණු ගැන ද මහේස්ත්‍රාත්වරයා සිතා බලා 2 වන ඡෙදය යටතේ යම් කිසි නියෝගයක් කළ යුතු ය. මෙසේ පුරුෂයකු විසින් කැමැත්ත දක්වා තිබියදී වුව ද ඔහු අනාචාරයේ හැසිරේ යයි හෝ ඔහු තම භාය්‍යාවට සිරිතක් වශයෙන්ම දරුණු ලෙස සලකා තිබේ යයි මහේස්ත්‍රාත්වරයා සැහීමකට පත්වුව හොත් එකී නියෝගය කළ හැක.

මේ ඡෙදයෙහි සඳහන්වී ඇති ලෙස බිරිඳ භාරගැනීමට කැමතිවීම නිව්‍යාජ අදහසින් කළ යුතු ය. (සතාසිවම් එ. මානික්කරත්නම්, 64 සතිපතා ලංකා නීති සංග්‍රහය. 107).

මෙහිදී මහේස්ත්‍රාත්වරයා එය නිව්‍යාජ ලෙස බිරිඳ බාර ගැනීමට කැමතිවීම නිව්‍යාජ නොවේ යයි සඳහන් කර නැතත් ඔහුගේ නඩු තීන්දුවෙන් එය නිව්‍යාජ යයි ඔහු නො සිතන බව සලකා ගත හැක්කේ මහේස්ත්‍රාත්වරයා ''මෙම නඩුවේ වගඋත්තරකරු මෙම නඩුව විභාගයට ගන්නාතුරු බලා හිඳ නඩුව විභාග වෙගන යද්දී මෙම ආරාධනය පළමු වරට කර තිබේ'' යනු කියා තිබීම නිසා ය.

එම නිසා මෙසේ බිරිඳ බාර ගැනීමට කැමතිවීම නිව්‍යාජ නොවේ ය යන හේතුව උඩ ඉල්ලුම් කාරියට ජය ගැනීමට සුදුසු ව තිබේ.

මේ නිසා මම ගාස්තුවට යටත් කොට ඇපැල නිෂ්ප්‍රභා කරමි.

ඇපැල නිෂ්ප්‍රභා විය.

* ඉංග්‍රිසි පිටපත ඉංග්‍රිසි අංගයේ 65 වෙනි කා., 111 වෙනි පිටබලනු.