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with a Section in Sinhala

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WITH A DIGEST

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Held : (1) That the Bribery (Amendment) Act of 1958 did not constitute an amendment of the Ceylon Constitution as it did not bear the certificate of the Speaker of the House of Representatives to show that it had been passed by a two-thirds majority, as required by the proviso to section 29 (4) of the Ceylon (Constitution) Order-in-Council of 1946. Any power given to the Ceylon Parliament by section 29 (4) was expressly subject to its proviso and in the case of amendment or repeal of the Constitution the Speaker's certificate was, therefore, a necessary part of the legislative process. A bill which did not comply with the condition precedent of the proviso would be invalid and *ultra vires* even though it had received the Royal Assent.

(2) That such provisions of the Bribery (Amendment) Act of 1958 as were in conflict with the Constitution were, therefore, invalid.

(3) That section 55 of the Ceylon (Constitution) Order-in-Council of 1946 was contravened when the Bribery (Amendment) Act of 1958 purported to create Bribery Tribunals for the trial of persons prosecuted for bribery. For the members of such Tribunals were " judicial officers " within the meaning of section 55 but were not appointed by the Judicial Service Commission as required by that section.

(4) That the members of such Tribunals were, therefore, not lawfully appointed and any orders made by them against the respondent in the present case were null and void.

Per THE JUDICIAL COMMITTEE :—(*A*) " The voting and legislative power of the Ceylon Parliament are dealt with in sections 18 and 29 of the Constitution.

'18. Save as otherwise provided in subsection 4 of section 29 any question proposed for decision by either Chamber shall be determined by a majority of votes of the Senators or Members, as the case may be, present and voting' . . .

'29. (1) Subject to the provisions of this order, Parliament shall have power to make laws for the peace, order and good government of the Island.

(2) No such law shall—

(*a*) prohibit or restrict the free exercise of any religion.'

There follow (*b*), (*c*) and (*d*) which set out further entrenched religious and racial matters, which shall not be the subject of legislation. They represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which *inter se* they accepted the Constitution ; and these are, therefore, unalterable under the Constitution."

(*B*) " In the present case, on the other hand, the Legislature has purported to pass a law which being in conflict with section 55 of the Order-in-Council, must be treated, if it is to be valid, as an implied alteration of the constitutional provisions about the appointment of judicial officers. Since such alterations, even if express, can only be made by laws which comply with the special legislative procedure laid down in section 29 (4), the Ceylon Legislature has not got the general power to legislate so as to amend its Constitution by ordinary majority resolutions, such as the Queensland Legislature was found to have under section 2 of its Constitution Act, but is rather in the position, for effecting such amendments, that that Legislature was held to be in by virtue of its section 9, namely, compelled to operate a special procedure in order to achieve the desired result."

(*C*) " No question of sovereignty arises. A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority, *e.g.*, when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the constitution there is only a bare majority if the constitution requires something more. The minority are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a two-thirds majority. The limitation thus imposed on some lesser majority of members does not limit the soveregin powers of Parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority."

Ceylon (Parliamentary Elections) Order-in-Council, 1946

(*A*) *Evidence Ordinance, sections* 123, 162—*Interpretation of expression " affairs of State "—Ceylon (Parliamentary Elections) Order-in-Council,* 1946—*Petition containing charge of corrupt practice within the meaning of section* 58 *by appellant (unsuccessful candidate) against respondent—Corrupt practice alleged relating to publication of false statements of fact in relation to personal character of appellant by respondent and his agents before and during election—Attempt by appellant to prove such statements by producing reports of speeches made at election meetings forwarded by police officers attending such meetings to their superiors on special instructions—Claim of privilege from production taken under section* 123 *of the Evidence Ordinance—Claim supported by affidavit from Inspector-General of Police—Order by trial judge upholding claim—Validity of the order.*

This was an appeal under section 82A of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, as amended by section 24 of the Ceylon Parliamentary Elections (Amendment) Act, No. 11 of 1959, by the petitioner who unsuccessfully presented a petition under section 79 of the aforesaid Order-in-Council challenging the election of the 1st respondent to the House of Representatives as member for Hewaheta.

In his petition the petitioner prayed : (*a*) that a recount of the votes be ordered before the trial ; (*b*) that a declaration be made by the Court that the return of the 1st respondent as a member at the said election was null and void on the ground of—

(i) the commission of the offence of undue influence as defined in section 56 of the Ceylon (Parliamentary Elections) Order-in-Council, 1946 ; and

(ii) the commission of a corrupt practice within the meaning of section 58 of the same Order-in-Council in that the 1st respondent by himself or his agents published before or during the said election, false statements of fact in relation to the personal character of the petitioner for the purpose of affecting the return of the petitioner at the said elections.

After trial the petition was held by the Election Judge to have failed on all grounds and the 1st respondent was held to have been duly elected and returned.

In the petition of appeal filed, the appellant sought to have the findings of the Election Judge on the charges of undue influence and corrupt practices set aside on various grounds of law.

At the hearing of the appeal the Counsel for the appellant restricted himself to arguing that the dismissal of the charge of corrupt practice of making false statements in relation to the petitioner's per-

sonal character was vitiated by an order made by the trial judge upholding an objection taken to the production of certain documents in the custody of a police officer.

The documents in question which the petitioner desired to produce at the trial, according to the evidence, consisted of reports made in the following circumstances. Certain police officers were assigned the duty of attending election meetings in the electoral area in question and making notes of the speeches that were made whenever the speakers " spoke disparagingly of the Government " or " if any person was reprimanded or if some speaker said anything against a person ". Not more than one officer made such notes at any single meeting. After the meeting was over the procedure was for the officer to go back to the police station and prepare five copies of a report (within twenty-four hours) and hand them over to the officer-in-charge, who had to forward them to the Superintendent of Police of the district—Kandy.

Three constables of the Talatuoya Police Station were present at seven election meetings held within its area and they made their respective reports as aforesaid.

The petitioner summoned the officer-in-charge of the said Police Station and the Superintendent of Police, Kandy, to produce or cause to be produced at the trial the reports of the said three constables containing the notes of the speeches made at the meetings attended by them. The officer, who brought the reports to Court in obedience to the summons claimed privilege from production under section 123 of the Evidence Ordinance. This claim was supported by an affidavit from the Inspector-General of Police, stating *inter alia* that the said documents " are unpublished official records relating to affairs of State and belong to a class of documents the practice of keeping which secret is necessary for the proper functioning of the Public Service " and that after a careful consideration of the said documents he was of opinion that it would be injurious to the public interest if the said documents were to be produced.

After argument, the Election Judge purporting to follow a decision of the Lahore High Court in *Nazir Ahmed* v. *Emperor*, A.I.R., (1944) Lahore 434, refused permission for the production of the reports on the ground that the words " any matter of State " in section 123 of the Evidence Ordinance should be given a wide interpretation and that " any matter which appertains to the exercise of governmental or administrative functions is an affair of State ".

Two questions were argued before Their Lordships :—

(*a*) Whether the learned Election Judge was wrong in not permitting the production in evidence of the said reports ;
(*b*) if so, whether the charge of committing the corrupt practice aforesaid should be ordered to be tried anew.

Held : (1) That the said reports are not " unpublished records " as they are records of speeches made in public ; nor do they relate to " affairs of State " within the meaning of section 123 of the Evidence Ordinance as this expression should be limited to matters relating to diplomacy, statecraft and the business of government and should not be interpreted as co-extensive with state or government business.

(2) That the question as to whether any particular document comes within the expression " affairs of state " must be determined in each case on the relevant facts and circumstances adduced before the Court.

(3) That in deciding whether the production of a document should not be barred by section 123 of the Evidence Ordinance the Court is not precluded by section 162 (2) of the same Ordinance from inspecting the document. Section 162 (2) does not have any application to section 123.

(4) That for the purpose of exercising its functions under section 123, the Court may inspect the document which it is invited to shut out thereunder.

(5) That if a document is an unpublished record relating to any " affair of state " within the meaning of section 123, the Court is bound not to permit its production, but the Head of the Department concerned has a discretionary power to grant permission to produce it. The question whether the public interest will suffer or not does not arise under section 123, because if the document, the production of which is sought, comes within the ambit of the section the Court must shut it out.

(*B*) *Appeal to Supreme Court under section* 82*A of Ceylon* (*Parliamentary Elections*) *Order-in-Council as amended by section* 24 *of the Ceylon Parliamentary Elections* (*Amendment*) *Act, No.* 11 *of* 1959—*Power conferred on Supreme Court by section* 82 *B* (3) *to order new trial—Failure on the part of the appellant to call other witnesses on his list except an Inspector of Police, after order upholding claim of privilege—This Inspector called to give evidence of statements made at election meetings at which he was present—Trial Judge disbelieving him partly because he was speaking from memory of what he had heard over two years ago and partly because he showed a bias against respondent—Delay—Should Court order a new trial ?—Evidence Ordinance, section* 167.

The second question that arose for decision of the Court was whether it should, in exercise of the discretion vested in it under section 82B (3) of the Ceylon (Parliamentary Elections) Order-in-Council as amended by Act, No. 11 of 1959, order that this election petition be tried anew on the charge of corrupt practice.

The decision of the election Judge not to permit the production of the said reports had the effect of rejecting all relevant evidence of the contents of those reports, which the appellant could otherwise have adduced in proof of the charge of corrupt practice. In view of that order, appellants' counsel at the trial stated that he would not further question one of the constables who made some of the said reports and who had already commenced his examination-in-chief. For the same reason he refrained from calling the other police officers to speak to the contents of the reports prepared by them.

He, however, called Inspector Piyadasa, who gave evidence regarding a speech made by the 1st respondent at a certain meeting, notes of which were embodied in one of the reports which was not permitted to be produced by the Election Judge. This Inspector could speak from recollection of what the 1st respondent had said.

The Election Judge disbelieved this witness for the reasons : (*a*) that he was speaking from memory of what he had heard about 2 1/2 years ago ; (*b*) that he had a bias against the 1st respondent. It did not appear from the judgment that, even if the records had been produced and they corroborated this witness, the Judge would have still disbelieved him.

It was contended on behalf of the respondent—

(*a*) that if a new trial was ordered, it would not only provide the appellant with a second opportunity of calling evidence which he had omitted to call at the trial, but also open the door to perjured testimony being adduced at the new trial ;

(*b*) that the long interval of time that had lapsed should weigh against a new trial ;

(*c*) that since the contents of the reports remain undivulged even now, there was no reason to think that they would have such relevance. Consequently ordering a new trial would be to permit the petitioner " to fish for evidence ".

Held : By Basnayake, C.J., and Weerasooriya, S.P.J., (T. S. Fernando, J., *dissentiente*) :—That as the trial Judge had formed his conclusions of fact without hearing evidence which was material, it was necessary that there should be a new trial in respect of the charge of making false statements. This was not a case of giving the appellant a second opportunity of calling evidence, for what he asked for was to be given a first opportunity of adducing in evidence the police reports, which was wrongly denied to him at the trial.

Their Lordships also directed that the appellant should not be permitted at the new trial to call those witnesses whom he was not prevented by the aforesaid ruling of the trial Judge and whom he refrained from calling at the trial.

Per Basnayake, C.J.—" Whether the document has been published or not, whether it is an official record or not, and whether it relates to any affairs of State, are questions of fact. The decision of these questions of fact will, of course, be preceded by a decision on the meaning of the expression ' affairs of State ', which is a question of interpretation and as such a matter of law. If the Court requires evidence in order to decide the questions arising for decision, such evidence must be taken in open Court, as our law does not provide for the taking of evidence by affidavit except in certain specified cases (section 179, Civil Procedure Code) ".

Per Weerasooriya, S.P.J.—" The provision in section 82B giving power to order that an election petition be tried anew is of recent origin, having been introduced by Act No. 11 of 1959. In exercising this power the Court would be guided by the same considerations as in a case where the question is whether a new trial should be ordered by the Court in the exercise of its ordinary appellate jurisdiction.

Section 167 of the Evidence Ordinance provides, *inter alia*, that the improper rejection of evidence shall not be ground of itself for a new trial if it shall appear to the Court that, if the rejected evidence had been received, it ought not to have varied the decision ".

Per T. S. Fernando, J.—" We have to decide the question of ordering a retrial without overlooking the circumstance that Piyadasa has been disbelieved. If we are unable to prevent Inspector Piyadasa being called to testify at a new trial—and that I understand is the view of the rest of the Bench—then, I fear, we are giving the petitioner a second chance, after a failure of the first, to see whether a trial judge will believe the evidence of Piyadasa ".

" If the charge of committing a corrupt practice by making false statements is to be tried anew, the witnesses, will be called upon to testify, about four years after the event, to words uttered at meetings in July, 1960. Considering the long interval of time that has elapsed—a delay not attributable in any way to the 1st respondent—I am unable to say that the discretion vested in this Court by section 82B (3) of the Order-in-Council requires to be exercised in favour of granting a re-trial at this stage. The charge is one in the nature of a criminal charge and it seems to my mind that justice will be met in this case by our making a decision on the question of law which will serve for occasions in the future without exercising in favour of the petitioner the discretion vested in the Court in the matter of retrials. Such an order would, in my opinion, conform to the spirit of the rule embodied in the maxim *nemo debet vexari*, a rule to be encouraged in cases where considerable delay has already occurred ".

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Civil Procedure

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Section 18—*Addition of party as defendant—Requirement that Court should set out ground on which order adding party is made.*

Held : That when a Judge makes order adding a party as defendant he should comply with section 18 (2) of the Civil Procedure Code which requires that every order for such addition should state the facts and reasons which together form the ground on which the order is made.

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Section 86—Availability of an injunction thereunder against an employee after employment terminates—Legal possession of business premises always to be in employer.

Administration of estates—Rights of heirs to be always subject to administrator's over-riding power to utilise assets to best advantage of estate.

Held : (1) That where an employee wilfully continues to remain in control of a place of business, the administrator of the deceased owner's estate has a right to an interim injunction under section 86 of the Courts Ordinance restraining that employee from continuing in control.

(2) That the rights which accrue to the heirs in respect of the estate of a deceased dying intestate are subject to the overriding power of the administrator of that estate in utilising the assets to the best advantage of the estate.

(3) That in the present case, as the legal relationship between the owner of the ice-plant and its manager was purely that of employer and employee, legal possession of the plant, even though constructive, continued always to be with the owner.

Criminal Procedure

Criminal Procedure—Maintenance case—Applicant's right to call evidence after the defendant's case closed.

Held : That as the procedure followed in maintenance cases is that followed in Criminal Courts, an applicant in a maintenance case should not be permitted to call fresh evidence after the defendant's case has been closed except on a matter arising *ex-improviso.*

Postponement, application for, in criminal case—Proctor stating he was retained only to apply for date—Refusal by Magistrate—Application renewed on the ground that documents and witnesses not available—List of witnesses not filed—Application refused as no list filed—Accused himself ready for trial—Trial proceeded and adjourned to enable prosecution to cite witness already listed—Whether this course prejudicial to accused.

A Proctor made an application for postponement of the trial in the Magistrate's Court on the ground that he was retained only that morning for the purpose of making an application for a date. This application having been refused, he renewed the application on the ground that the documents and witnesses in support of the defence were not available. The Magistrate, on being satisfied that a list of witnesses had not been filed in the case, refused a date on the ground that there was no merit in the application. The accused himself being ready for trial, the trial proceeded, and after three witnesses for the prosecution gave evidence a date was given to cite a witness in the list attached to the plaint.

Held : (i) That in the circumstances, the Magistrate was justified in refusing the applications for postponement made to him.

(ii) That no prejudice was caused to the accused by the Magistrate hearing part of the case for the prosecution and adjourning the trial for another date.

Criminal Procedure Code

Criminal Procedure Code, section 114—Application by local authority to abate public nuisance.

Held : That a local authority is not entitled to an order under section 114 of the Criminal Procedure Code for preventing an inhabitant of an area from resisting the dumping of night soil, in a trenching ground in his neighbourhood, resulting in a nuisance to him although this ground had been used for this purpose previously for a long time.

Sections 304, 325 (1) (b), 338 (1)—Conditional discharge—Accused bound over to be of good behaviour—Right of Appeal.

Held : That where an accused person is bound over under section 325 (1) (*b*) of the Criminal Procedure Code to be of good behaviour and to appear for conviction and sentence when called upon to do so, such an order is neither a "judgment" nor a "final order" of a Magistrate's Court. Accordingly, there is no right of appeal from such order.

Sections 148 (1) (b), 148 (1) (d), 151 (2)—Accused produced otherwise than on summons or warrant—Failure of Magistrate to hold the examination directed by section 151 (2) forthwith.

Held : That when an accused person is brought before Court in custody without process, the failure of the Magistrate to examine the Police Officer so producing him on oath on the same day, constitutes a failure to hold the examination directed by section 151 (2) of the Criminal Procedure Code and vitiates the subsequent proceedings.

Sections 148 (1) (d), 151 (2), 187 (1)—Meaning of the word "forthwith" in section 151 (2).

Held : That where an accused person is produced before a Magistrate otherwise than on summons or warrant, it is incumbent on the magistrate to examine on oath the person so producing him forthwith—*i.e.*, on the same day. Failure to do so vitiates the subsequent proceedings.

Section 151 (2)—*Whether Police officer producing accused in Court should be examined—Not an imperative provision of law.*

Held : That in a case to which section 151 (2) of the Criminal Procedure Code applies, if the virtual complainant is examined and speaks to facts upon which a Magistrate can decide that a charge should be framed, it would be merely a technical requirement that in addition the officer producing the accused should also be examined. There is no imperative provision of law requiring such officer to be examined by the Magistrate.

Sections 325 *and* 356.

Criminal Procedure Code, sections 312 (1), 338 (1) (*a*)—*Time within which an appeal should be preferred—How computed—Sentence—Section* 312 (1) (*v*) *inconsistent with section* 312 (1) (*c*)—*Need for attention of Legislature.*

Held : (1) That the time within which an appeal should be preferred under section 338 (1) of the Criminal Procedure Code must be computed from the date on which the reasons for the conviction and sentence were given and not from the date on which the conviction and sentence were entered.

Per SRI SKANDA RAJAH, J.—" Mr. Premaratne, very properly, drew my attention to the fact that under section 3 of the Knives Ordinance only a fine can be imposed and, therefore, the default sentence should be simple imprisonment and not rigorous, in view of section 312 (1) (*e*) (*v*). That section empowers the Magistrate in such case where there is no imprisonment mentioned as a punishment in the penal provision to pass a sentence of three months' simple imprisonment in respect of a fine of Rs. 50/- as in this case. I think this matter should receive the attention of the legislature ".

Sections 325 (1), 325 (2) *and proviso to* 347—*Magistrate recording, " I find the accused guilty ", or " I convict the accused " and thereafter dealing with accused under section* 325 (1)—*Legality thereof—Whether defect curable under section* 425.

Is it open to the Supreme Court, in appeal or by way of revision to make use of section 325 *without setting aside the conviction so entered ?*

Observations on the use of section 325.

At the end of a trial the Magistrate entered of record as follows :—" I find the 1st accused guilty on counts 1, 5 and 7. I find 2nd accused guilty on counts 2 and 4. I find the 3rd accused guilty on count 3. Reasons and sentences on 21st May, 1963 ".

After delivering his reasons for his order he recorded as follows :—" Without proceedings to conviction I discharge the accused conditionally under section 325 of the Criminal Procedure Code . . . ".

Held : (1) That when the Magistrate entered of record, " I find the accused guilty ", he proceeded to convict the accused. Thereafter he was not entitled to say, " without proceeding to conviction ", and deal with the accused under section 325 of the Criminal Procedure Code. This would be not merely an irregularity but an illegality not curable under section 425 and any bond taken under it was not enforceable.

(2) That section 325 (2) is not applicable to cases in which a Magistrate, who is also a District Judge, assumes jurisdiction under section 152 (3) of the Criminal Procedure Code. In such cases the Magistrate has to act under section 325 (1).

(3) That it is not open to the Supreme Court, either in appeal or by way of revision to make use of section 325 without disturbing the conviction entered by the Magistrate.

Per SRI SKANDA RAJAH, J.—(*A*) " For the guidance of Magistrates I would make the observations that now follow. If an accused *pleads guilty* and the Magistrate proposes to deal with him under section 325, he will not proceed to say, ' I find the accused guilty on his own plea ', or ' I convict the accused on his own plea ', which are synonymous, as will be seen from some of the cases referred to later on in this order. This is also made quite clear in *Fernando* v. *Senaratne*, 48 N.L.R. 431 ".

(*B*) " If at the *end of the trial* he thinks that a charge has not been proved, he will say, ' I find the accused not guilty ' or ' I acquit the accused '. But if he reaches the point when he thinks that ' the charge is proved ' he will stop at that stage if he proposes to deal with the accused under section 325 (1). He will not proceed further and say, ' I find the accused guilty ', or ' I convict him '."

(*C*) " It was argued by Mr. Pullenayagam that the Magistrate saying, ' I find the accused guilty ', undoubtedly means that he has proceeded to conviction but that that is only an irregularity and not an illegality which would render the bond taken void. On the other hand, Mr. Rajaratnam argued that it was an illegality and not curable under section 425 of the Criminal Procedure Code and any bond taken in breach of that is an illegal bond and not enforceable. Mr. Rajaratnam also drew attention to the terms of the bond, viz., ' to appear for conviction and sentence '. I am inclined to agree with Mr. Rajaratnam's submission that such a bond cannot be enforced ".

Section 122 (3)—*Does this section override provisions of section* 27 *of Evidence Ordinance.*

Sections 147 (1) (*b*) *and* (*c*) *and* 380—*False evidence in a judicial proceeding.*

Section 335—*Appeal with leave of Court only—Need to give reasons for granting leave to appeal.*

Customs Ordinance

Certiorari and Mandamus—Imposition of penalty for importing prohibited and restricted goods—Duty to act judicially—Customs Ordinance, sections 8 (2), 43, 129, 144, 165.

The petitioner was the holder of a licence issued by the Controller of Imports to import certain watch spare parts from Switzerland. The petitioner claimed that on March 19, 1962, he had imported into Ceylon the goods covered by the licence. The petitioner was not permitted to pass a bill of entry in respect of these goods. He was instead served with a summons dated April 11, 1962, requiring him to appear before the respondent, the Principal Collector of Customs, on April 18, 1962, for the purpose of an inquiry under the Customs Ordinance, at which inquiry the petitioner was called upon *merely to identify the goods.*

By a letter of October 15, 1962, the respondent informed the petitioner that the goods imported on March 19, 1962, were forfeit in terms of section 43 of the Customs Ordinance by reason of the importation being contrary to the table of prohibitions and restrictions inwards. (This order was challenged by the petitioner in an action instituted by him in the District Court on November 12, 1962). The respondent further informed the petitioner that an additional forfeiture of Rs. 149,850/- had been imposed on him under section 129 of the Customs Ordinance, being a forfeiture of treble the value of the goods so imported, and called upon him to pay that amount on or before October 29, 1962.

This penalty not having been paid, on November 15, 1962, the respondent informed the petitioner by letter that in terms of section 144 of the Customs Ordinance, " I am taking steps to stop all your imports or goods you bring into or you are seeking to export or taking out of Ceylon until the additional forfeiture of Rs. 149,850/- is paid ".

Meanwhile, in August, 1962, the petitioner had applied for and obtained from the Controller of Imports another licence to import certain watch spare parts from Hong Kong. These goods reached Ceylon in September, 1962, but the petitioner was not permitted to pass bills of entries. It was not denied by the respondent that in compliance with the letter of November 15, 1962, the petitioner was being prevented from removing these goods.

Thereupon, the petitioner applied to the Supreme Court for the issue of Writs of *Certiorari* and *Mandamus* to quash the imposition of the additional forfeiture of Rs. 149,850/- and to compel the respondent to permit the petitioner to present bills of entry in respect of goods other than those said to be forfeit.

Section 129 of the Customs Ordinance reads as follows :—

> " Every person who shall be concerned in importing or bringing into Ceylon any prohibited goods, the importation of which is restricted, contrary to such prohibition or restriction, and whether the same be unshipped or not, and every person who shall unship or assist, or be otherwise concerned in the unshipping of any goods which are prohibited, or of any goods which are restricted and imported contrary to such restriction, or of any goods liable to duty, the duties for which have not been paid or secured, or who shall knowingly harbour, keep or conceal, or shall knowingly permit, or suffer, or cause, or procure to be harboured, kept, or concealed, any such goods, or any goods which have been illegally removed without payment of duty from any warehouse or place of security in which they may have been deposited, or into whose hands and possession any such goods shall knowingly come, or who shall assist or be concerned in the illegal removal of any goods from any warehouse or place of security in which they shall have been deposited as aforesaid, or who shall be in any way knowingly concerned in conveying, removing, depositing, concealing, or in any manner dealing with any goods liable to duties of customs with intent to defraud the revenue of such duties or any part thereof, or who shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of such duties or any part thereof, shall in each and every of the foregoing cases forfeit either treble the value of the goods, or the penalty of one thousand rupees, at the election of the Collector of Customs.

Held : (1) That the officer of the Customs conducting an inquiry under section 129 must act judicially, and the liability of a person to a penalty of forfeiture must be objectively assessed on an evaluation of the evidence on oath of the persons examined at such inquiry.

Accordingly,

(*a*) since there was no inquiry at which the petitioner had an opportunity to show that by importing the goods in question he had not acted in contravention of law,

the imposition of the additional forfeiture of Rs. 149,850/- was declared to be of no legal effect and was quashed by *Certiorari* ; and

(*b*) since the refusal of the respondent, relying on section 144, to pass goods imported by the petitioner was without authority,

a writ of mandamus was issued to compel the respondent to perform his implied statutory duty to permit the petitioner to present bills of entry, etc., and remove goods which are not claimed to be forfeit.

Per T. S. Fernando, J.—" Large powers reposed by Parliament in public officers must be exercised in a responsible manner and not forgetful of a sense of fairness ".

Election Petition

See under—Ceylon (Parliamentary Elections) Order-in-Council, 1946.

Evidence

Applicant's right to call evidence after close of defendant's case in maintenance proceedings.

Evidence Ordinance

Evidence Ordinance, section 27—*Criminal Procedure Code, section* 122 (3)—*Does the latter section override the provisions of the former ?—The relation between the two sections—Application of maxim "Generalia specialibus non derogant"—Validity of decision in Rex* v. *Jinadasa*, 51 *N.L.R.* 529.

The respondent was tried and convicted in the S.C. under section 300 of the Penal Code, on a charge of shooting one Piyadasa with a gun with such intention or knowledge as would have resulted in murder, if Piyadasa had died. In addition to other witnesses, a Police Sergeant, *J.*, was called by the prosecution for the purpose of deposing to a statement made by the respondent in consequence of which a gun capable of causing the injury actually inflicted had been discovered. At the time of making the statement in the course of a Police investigation under section 122 of the Criminal Procedure Code the respondent was undisputedly in the custody of the Police.

At the trial, in the absence of the jury, the prosecuting counsel told the Judge, who had the written record of the statement before him, that he proposed to "lead in certain portions of the statement made by the accused in consequence of which the gun was discovered". The jury was recalled, and the portion of the accused's statement, which read, "I am prepared to point out the place where the gun and the cartridges were buried" was put before them. Sergeant *J.* was cross-examined on this statement by defence counsel. The respondent did not give evidence.

In his summing up to the jury, with regard to the evidence of Sergeant *J.* as to the finding of the gun, the judge directed them that it meant nothing more than that the accused was aware of where a gun and cartridges were buried, not necessarily buried by him.

The jury returned an unanimous verdict of guilt and the respondent was sentenced to ten years' rigorous imprisonment. His appeal against conviction and sentence was allowed by the Court of Criminal Appeal on the ground that *J's.* evidence as to the information leading to the discovery of the gun and cartridges was improperly admitted, since section 27 of the Evidence Ordinance did not permit the giving of evidence that was covered by section 122 (3) of the Criminal Procedure Code.

Held : (*a*) That section 122 (3) of the Criminal Procedure Code bars oral evidence as well as written records, and it extends to accused persons as much as to any other witness. (*R.* v. *Jinadasa*, (1950) 51 N.L.R. 529, overruled ; *R.* v. *Buddharakkita Thera*, 63 N.L.R. 433, followed).

(*b*) That, applying the maxim of interpretation *generalia specialibus non derogant*, section 27 of the Evidence Ordinance was the particular enactment, while section 122 (3) of the Criminal Procedure Code was a general provision, and, therefore, evidence falling within section 27 can lawfully be given at a trial, even though it would otherwise be excluded as a statement made in the course of an investigation under section 122. (*R.* v. *Don Wilbert*, 64 N.L.R. 83, referred to).

(*c*) That the rule in section 27 limits the admissible words, whether they amount to a confession or not to those relating distinctly to the fact discovered, and the Judge is not at liberty to go beyond that limit, however much the prosecution may wish to do so, and even though it may result in the exclusion of self-exculpatory statements.

(*d*) That the summing-up by the Judge in this case was such that it could not fairly be said that any injustice was caused to the defence by the words of the statement that were admitted under the rule in section 27, being admitted in the limited form chosen by the Judge.

QUEEN *v.* RAMASAMY 81

Section 118—*Evidence of witness recorded without administering oath or affirmation—Person competent to testify.*

QUEEN *v.* SIRIPINA 13

Sections 123, 126 *and* 167—*Claim of privilege from production of documents—Interpretation of expression "affairs of State".*

DANIEL APPUHAMY *v.* ILANGARATNE 17

Executors and Administrators

See under—ADMINISTRATION OF ESTATES

Food Control Act

Writs of Certiorari and Mandamus—Revocation of authorisation given to wholesale dealer to deal in rationed commodities—Failure to give notice of intended revocation—Penalty in lieu of revocation—"Audi alteram partem"—Mandamus granted for reason other than that for which it had been invoked—No necessity to amend application—Food Control Act, No. 25 *of* 1950, *section* 8—*Defence (Food Control) (Special Provisions) Regulations*, 1943, *Regulation* 18 (1).

The petitioner Union, a wholesale dealer authorised by the 1st respondent, the Deputy Food Controller, in terms of the Food Control Act, to deal in rationed commodities, received the following letter (P 6), dated June 27, 1963 :—

"I hereby cancel the licence issued to the Kadawata Meda Korale Multi-purpose Co-operative Societies Union, Limited, as a wholesale dealer under clause 8 (1) of the Food Control Act, No. 25 of 1950."

Section 8 of the Food Control Act reads as follows :—

8 (1) : "The Food Controller may, if he is satisfied that any distributor, merchant or dealer has contravened the provisions of any Order or regulation made or deemed to be made under this Act, or if he considers it expedient so to do in the

interests of the public, revoke any authorisation or directions, relating to the sale or supply of any food, article of food or cattle, issued to such distributor, merchant or dealer ".

8 (2) : " In any case where it would be lawful for the Food Controller in accordance with the provisions of sub-section (1) to revoke any authorisations or directions, he may, on an application made by the distributor, merchant or dealer, as the case may be, in lieu of such revocation, order such distributor, merchant or dealer to pay a penalty of an amount not exceeding five thousand rupees ".

Aggrieved by this cancellation, the petitioner applied to the Supreme Court on July 1, 1963, for the issue of writs of *certiorari* and/or *mandamus* to, *inter alia*, quash the order purported to be conveyed by letter P 6.

Held : That the respondent was under a duty to give notice to the petitioner that he intended to revoke the authorisation granted to him so that the petitioner may decide whether he should make the application specified in section 8 (2).

Accordingly, the Court issued—

(*a*) a writ of *certiorari* quashing the order of June 27, 1963, contained in letter P 6, and

(*b*) a writ of *mandamus* directing the 1st respondent to give the petitioner notice of intended revocation of its authorisation as a wholesale dealer.

KADAWATA MEDA KORALE MULTI-PURPOSE CO-OPERATIVE SOCIETIES UNION, LIMITED *v.* RATNAVALE AND ANOTHER 49

General Medical Council

See under—MEDICAL PRACTITIONERS

Injunction

Availability of—Against an employee after employment terminated.

PUBLIC TRUSTEE *v.* CADER 109

Judge

Factors which should be taken into consideration in matters of sentence.

QUEEN *v.* DON LEELARATNE 57

See also under—BRIBERY ACT.

Jurisdiction

Acquisition proceedings under Land Acquisition Act—Reference to Court—Whether District Court has jurisdiction to decide claim made before it by parties who have made no claim before acquiring officer.

PERERA *v.* DINGIRI MENIKA 45

Whether Bribery Tribunals created by Bribery Act validly constituted—Jurisdiction of such Tribunals to make orders against persons charged before them.

BRIBERY COMMISSIONER *v.* RANASINGHE 1

Whether Supreme Court can make use of section 325 of Criminal Procedure Code without setting aside conviction.

RAMASAMY & OTHERS *v.* SUB-INSPECTOR OF POLICE, AGRAPATANA.

Knives Ordinance

See under—CRIMINAL PROCEDURE CODE.

HARAMANIS APPUHAMY *v.* INSPECTOR OF POLICE, BALANGODA 62

Land Acquisition

Land Acquisition Act, No. 9 of 1950, sections 7, 9, 10, 11, 12—Civil Procedure Code, section 18—Reference of claim or dispute to Court by acquiring officer under section 10 (1) (b)—Application to Court by parties who had made no claim before acquiring officer—Has Court jurisdiction to decide such claims—Whether provisions of section 18 of Civil Procedure Code applicable in such a case.

Held : (1) That a person who has not made any claim to the acquiring officer in pursuance of the notice under section 7 of the Land Acquisition Act cannot thereafter make a claim before the District Court after the acquiring officer had referred to it any claim or dispute which arose at the inquiry held by him under section 9 of the Act. Inasmuch as such a claim was not before the acquiring officer, it could not have been referred by him to the District Court for determination and the Court would, therefore, have no jurisdiction to decide such a claim.

(2) That by virtue of section 12 of the Land Acquisition Act, the Civil Procedure Code applies to proceedings in Court after a reference by the acquiring officer under section 10.

(3) That, however, section 18 of the Code had no application to a case such as the present as the presence before Court of persons who are seeking to make a claim not made before the acquiring officer or to raise a dispute not referred to Court by him, is not necessary for determining the dispute referred by the acquiring officer to the Court for its determination.

PERERA *v.* DINGIRI MENIKA 45

Land Acquisition Ordinance, sections 38, 40 and 42 (2)—Powers accruing to officers acting thereunder and nature of procedure to be followed—Does the owner of land already acquired thereunder have a right to appear and show cause against an application made under section 42 (2) for an order of possession.

Held : That an application made to a Magistrate under section 42 (2) of the Land Acquisition Ordinance for an order directing the Fiscal to deliver possession of land sought to be acquired by the Crown is an *ex-parte* one and there is no provision for anyone to be heard in opposition thereto.

MOHAMED LEBBE *v.* MADANA 93

Landlord and Tenant

Landlord and tenant—Action to eject tenant on the ground that premises are reasonably required for the purpose of landlord's business—What is the date on which such reasonable requirement must be shown to exist—Rent Restriction Act, section 13 (1) (*c*).

Decision of District Judge on reasonable requirement—Whether final and not appealable.

Held : (1) That in an action for ejectment of a tenant on the ground that the premises are reasonably required for the purpose of the landlord's occupation or business, the date at which such reasonable requirement must be shown to exist is the date at which the Court is required to make the ejectment order and not the date of institution of the action.

(2) That the decision of a trial judge as to the question of reasonable requirement within the Rent Restriction Act is an appealable order.

Legal Maxims

"*Audi alteram partem*"

See under—FOOD CONTROL ACT

"*Generalia specialibus non derogant.*"

Local Authorities (Standard By-laws) Act

See under—LOCAL AUTHORITIES

Local Authorities

Local Authorities (*Standard By-laws*) *Act, No.* 6 *of* 1952, (*Cap.* 261), *section* 3 (1)—*By-law framed thereunder—By-law prohibiting sale of vegetables, etc., within the market area except at the public market, adopted by resolution and published in Gazette dated* 11*th November*, 1960—*Market area declared only on* 23*rd February*, 1963—*Validity of such by-law—Town Councils Ordinance*, (*Cap.* 256), *sections* 151 (3) *and* 156 (11) (*a*).

The appellant was charged and convicted under By-Law 16 (1) of Part XV of the Standard By-Laws framed under the Local Authorities (Standard By-Laws) Act, No. 6 of 1952, for selling vegetables in the market area of the Rakwana Town Council at a place other than the public market of that town. This by-law was adopted by a resolution of the 11th November, 1960, on which day it came into operation.

It was contended in appeal that the by-law in question was invalid as the Town Council had no power to make that by-law inasmuch as the market area for the town was not declared till 23rd February, 1963.

Held : That the by-law in question was invalid in law, as the assigning of the market area, which is one of the circumstances required by section 151 (3) of the Town Councils Ordinance (Cap. 256) to enable the Rakwana Town Council to make it, had not taken place at the time it was brought into force.

Maintenance

Applicant's right to call evidence after the defendant's case is closed.

Mandamus

See—OMER *v.* CASPERSZ AND ANOTHER .. 8

See—KADAWATE MEDA KORALE MULTI-PURPOSE CO-OPERATIVE SOCIETIES UNION, LTD. *v.* RATNAVALE AND ANOTHER 49

Master and Servant

Availability of injunction under section 86 *of the Courts Ordinance against an employee after employment terminated —Legal possession of business premises always to be in employer.*

See under—COURTS ORDINANCE 109

Medical Practitioners

Privy Council—Appeal thereto from decision of General Medical Council—What constitutes misdirection resulting in invalidation of proceedings—Legal Assessor—Extent and nature of powers and duties—General Medical Council (*Procedure*) *Rules*, 1958—*Statutory statement made under Rule* 5—*When use permissible.*

The appellant, a registered medical practitioner, was found guilty of infamous conduct in a professional respect by the Disciplinary Committee of the respondent General Medical Council, on the ground of adultery with the complainant, during a period beginning in June or July, 1954, and continuing in September, 1961. In a letter to the Committee of inquiry, the appellant had stated that he had not had sexual relations with the complainant "prior to 1960". The legal Assessor, advising the Committee stated that "one may infer from that, that he is not prepared to deny having had sexual relations with her since some time in 1960 and you have certainly then that part of her evidence corroborated which deals with the last year of this association". The appellant appealed on the ground *inter alia*, that the Legal Assessor's advice as to the corroborative value of the appellant's letter was incorrect.

Held : (1) That it would have been preferable if the advice tendered had been that the letter was capable of being considered as corroboration of the complaint's evidence, but that it was for the Committee to judge whether it, in fact, did so.

(2) That the Legal Assessor's position was not that of a judge summing-up to a jury. His duties were confined to advising on questions of law referred to him or intervening in order to inform the Committee of any irregularity in the conduct of their proceedings or advising them of a possibility of a mistake of law being made. Thus what might have amounted to a misdirection in law by a judge to a jury at a criminal trial does not necessarily invalidate the Committee's decision, as the Committee itself were the masters of both fact and law.

(3) That an appeal to the Privy Council must fail unless it revealed some defect in the conduct of the inquiry that may fairly be thought to have been of sufficient significance to the result to invalidate the Committee's decision.

(4) That despite the warning of the assessor of the danger of a finding of adultery on uncorroborated evidence, the Committee could, considering the weight of evidence, even though uncorroborated, come to a valid finding that the appellant was guilty of adultery.

(5) That in general it is undesirable that any use should be made of a statutory declaration except to the extent that it is made evidence by being made use of by the petitioner or his Counsel.

Oaths Ordinance

Oaths Ordinance, sections 4, 9—*Evidence Ordinance, section* 118—*Evidence of witness recorded without administering oath or affirmation—Requirement that oath or affirmation essential once Court is satisfied that a person is competent to testify—Meaning of word "omission" in section* 9 *of Oaths Ordinance—Whether it covers cases of deliberate omission.*

Held : (1) That once a Court is satisfied that a person is competent to testify in a case, then such person must be required to make oath or affirmation before being examined as a witness. His testimony cannot otherwise be regarded as legal evidence except in a case covered by section 9 of the Oaths Ordinance.

(2) That the "omission to take any oath or make any affirmation" contemplated in section 9 of the Oaths Ordinance is an accidental omission. It does not cover the case of a deliberate non-administration of an oath or affirmation.

Parliament

Sovereignty of.

Penal Code

Sections 367, 394—*Criminal Procedure Code, section* 325—*Is it applicable in a case where accused was charged with theft of two cars or alternatively with their retention as stolen property—Accused pleading guilty—Failure on the part of the Magistrate to consider admissible evidence against accused—Inadequacy of sentence—Factors which Judges should take into consideration in matters of sentence—Powers of Supreme Court to call for and examine records of proceedings in inferior Courts—Criminal Procedure Code, section* 356.

The accused was charged in two cases in the Joint Magistrate's Court, Colombo—viz., Nos. 27178 and 27374—with committing theft of two cars or in the alternative with the retention of stolen property.

The subject-matter of the 1st case was a car worth Rs. 10,000/- bearing No. 2 Sri 6014, reported stolen from the Fort on 11th February, 1963, and the accused was detected driving it at Norton Bridge on 1st March, 1963, with number plates 3 Sri 8694 and other number plates bearing EN 9804 in the luggage boot of the car. The accused was produced in Court and was bailed out in a sum of Rs. 3,000/- (certified bail) on 16th April, 1963.

The subject-matter of the 2nd case car No. 1 Sri 8439, of the value of Rs. 10,000/- was stolen on 22nd April, 1963, (six days after the accused was bailed out) from the Fort. On information received, the Police ambushed at Borella and arrested the accused while driving this car out of a garage on 24th May, 1963. A diary was found in that car containing the dates on which the accused had stolen cars noted in it.

In the second case, the accused was bailed out in a sum of Rs. 300/- with his wife as surety.

Both cases came up for trial before the Magistrate on 6th August, 1963, after he had assumed jurisdiction under section 152 (3). The accused who had pleaded not guilty earlier withdrew his former pleas and pleaded guilty in both cases. The Magistrate purported to consider these pleas of guilt for retaining stolen property, knowing or having reason to believe that these cars were stolen property and postponed the case for "identification and sentence", for 9th August, 1963, on which day he called for a report from the Probation Officer.

Though probation was not recommended by this officer in his report which contained unfavourable references to the accused, the learned Magistrate proceeded to deal with the accused under section 325 of the Criminal Procedure Code. He accepted the accused's wife described in the said report as "living in fear of the accused" as surety in a sum of Rs. 500/- and bound him over to be of good behaviour for three years. He also in the 1st case ordered the accused to pay Rs. 250/- as Crown costs by monthly instalments of Rs. 20/- and in the 2nd case a sum of Rs. 100/- as Crown costs to be paid by monthly instalments of Rs. 5/-.

The Supreme Court having called for the records of proceedings of the said two cases and examined them by virtue of powers vested in it under section 356 of the Criminal Procedure Code—

Held : (1) That inasmuch as (*a*) the offences with which the accused was charged were not trivial ones ; (*b*) there was evidence which was properly admissible, that it was this accused who had stolen these cars ; (*c*) the report from the probation officer would have shown the Magistrate that these were not proper cases to be dealt with under section 325 of the Criminal Procedure Code, the accused should be convicted in each of the cases for theft under section 367 of the Penal Code and sentenced to two years' rigorous imprisonment, sentences to run consecutively.

(2) That section 325 of the Criminal Procedure Code would not be applicable to grave offences.

(3) That in bailing out the accused in the second case, the Magistrate had not exercised his discretion at all, and also he had failed to realize that offences under sections 367 and 394 are not bailable.

His Lordship proceeded to indicate what factors should be taken into consideration by Judges in the matter of sentence as follows :—

Per SRI SKANDA RAJAH, J.—" I proceed to quote from the case of *The Attorney-General* v. *H. N. de Silva*, 57 N.L.R., p. 121. At page 124, Basnayake, A.C.J. (as he then was) says this : ' In assessing the punishment that should be passed on an offender the judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. A judge in determining the proper sentence should first consider the gravity of the offence as it appears from the nature of the act itself, and should have regard to the punishment provided in the Penal Code, or other Statute, under which the offender is charged.

(2) : He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective.

(3) : The incidence of crimes of the nature of which the offender has been found to be guilty.

(4) : The difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though, no doubt, an important consideration, is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail '. (*The numbering is mine*).

To these I would respectfully add as follows :—

(5) : Nature of loss to the victim.

In this case the loss to him was irreparable, especially in view of the prohibition on the importation of cars into this country. The victim would have been put to a great deal of inconvenience if he had to use the public modes of transport.

(6) : Profit that may accrue to the culprit.

In view of the shortage of cars in this country and the prohibitive prices of second-hand cars and also the demand for spare-parts, the profits to the culprit would be immense.

(7) : Also the use to which stolen article could be put ".

THE QUEEN *v.* W. V. DON LEELARATNE .. 57

Section 190—*False evidence in a judicial proceeding.*

In re HETTIARATCHILAGE RANASINGHE .. 104

Section 315—*Charge of voluntarily causing hurt with an axe—Conviction of accused—Adequacy of sentence of two weeks' imprisonment.*

Criminal Procedure Code, section 335—*Appeal with leave of Court only—Need to give reasons for granting leave to appeal.*

Held : That leave to appeal under section 353 of the Criminal Procedure Code should not be given lightly. Reasons must be given for granting such leave.

Per SRI SKANDA RAJAH, J.—" In my opinion, the use of an axe, which would have ended far more seriously than it actually did, had not the complainant tried to ward off the blow, calls for a deterrent sentence ".

ALAGAN *v.* APPUHAMY 108

Perjury

False evidence in a judicial proceeding—Power of District judge to remand witness.

In re HETTIARATCHILAGE RANASINGHE .. 104

Pleadings

Pleadings—Amendment of plaint—Plaintiff claiming incumbency through tutor, S.—Admission by plaintiff under cross-examination that his tutor had a co-pupil, M., who was senior and who officiated as Viharadhipathy—That M. and S. had two pupils, one C. and the plaintiff—C. as senior to plaintiff, became incumbent of another temple belonging to tutor, leaving temple in question to plaintiff—Before next date of hearing plaintiff moving to amend plaint averring : (1) S., his tutor, was " de facto " Viharadhipathy after M's. death with plaintiff's permission ; and (2) that C. abandoned his rights in favour of plaintiff—Should the amendment be allowed ?

Plaintiff sued four defendants for a declaration that he was entitled to the incumbency of Kiriwaula Vihara, claiming rights through his tutor, the last incumbent, Saranankara Thero. The defendants pleaded in their answer that one Sumana Thero, having been appointed by the dayakayas, was the Viharadhipathy of the temple, and after his death in 1959, the dayakayas appointed the 3rd defendant as his successor.

The plaintiff, giving evidence at the commencement of the trial, admitted under cross-examination :—

(*a*) that his tutor, Saranankara Thero, had a co-pupil, Medankara, who was senior to his tutor ;

(*b*) that Medankara officiated as Viharadhipathy ;

(*c*) that Medankara and Saranankara had two pupils, viz., Cuda Saranankara and the plaintiff. The former was robed earlier though ordained together ;

(*d*) that Cuda Saranankara became Viharadhipathy of another temple belonging to his tutor and the plaintiff claimed Kiriwaula Vihara and another ;

Before the next date of hearing, the plaintiff sought to amend his plaint by pleading :—

(*a*) that out of his two tutors Medankara became Viharadhipathy ;

(*b*) that though Cuda Saranankara was senior to the plaintiff, the former abandoned his rights to Kiriwaula Vihara and another in favour of the latter ;

(*c*) that although he succeeded Medankara as Viharadhipathy, his tutor, Saranankara, controlled these two Viharas with plaintiff's permission.

The learned District Judge upheld the objection taken by the defendants to the proposed amendments and the plaintiff appealed.

Held : That the proposed amendments should be allowed—

(*a*) as they sought to plead that Saranankara was only *de facto* Viharadhipathy, while Medankara was *de jure* Viharadhipathy ;

(*b*) as the plaintiff could succeed only if he could show that Cuda Saranankara had abandoned his rights ;

(*c*) as the cause of action was the same and the parties were the same ;

(*d*) as the proposed amendments sought to give the legal explanation of the actual position.

Per SANSONI, J.—" With respect, I am unable to uphold the learned Judge's order which loses sight of the important principle that the object of the rules governing amendment is to obtain a correct issue between the parties, just as the object of litigation is to adjudicate in real and not hypothetical matters in issue. If a mistake has been made in original pleading, there is no objection to a correction being made in order to achieve these purposes, provided no injustice is done to the other party, who would normally receive adequate compensation in an order for costs".

Prescription

Section 3 of Prescription Ordinance—Applicability as regards acquisition of servitude of light and air.

Prescription Ordinance, section 3—Prescriptive possession—How may it be proved.

Held : That mere statements of a witness, " I possessed the land " or " we possessed the land and " I planted plantain bushes and also vegetables ", are not sufficient to entitle him to a decree under section 3 of the Prescription Ordinance, nor is the fact of payment of rates by itself proof of possession for the purposes of this section.

Time within which action for refund of purchase money for failure to give possession should be brought —Prescription Ordinance, section 6.

Privy Council Decisions

Public Officer

Vested with statutory power—Must act in a responsible manner and with sense of fairness.

Rent Restriction

See under—LANDLORD AND TENANT.

Sale

See under—VENDOR AND PURCHASER

Sentence

Inadequacy of—Factors which should be taken into consideration.

Sentence—Sections 312 (1) (e) (v) and 312 (1) (c) of Criminal Procedure Code.

Adequacy of sentence of two weeks' imprisonment on charge of voluntarily causing hurt with an axe.

Servitudes

Servitudes—Acquisition of servitude of light and air by prescription—Whether adverse possession necessary in case of negative servitudes—Mere enjoyment of such right insufficient—Position not different in the Roman-Dutch Law—Prescription Ordinance, section 3—Sole law now governing this subject to be the Prescription Ordinance.

Judicial Precedent—Decision reported as Full Bench but only two out of the three Judges actually present at the hearing—Supreme Court consisting of only three Judges at such time—Full Bench of three Judges taking part in the decision of the appeal—Whether such decision binding on Bench of two Judges.

Held : (1) That a right of servitude of light and air could be acquired by prescription only in terms of section 3 of the Prescription Ordinance, which Ordinance made no distinction between positive and negative servitudes.

(2) That to satisfy the requirements of section 3, possession must be by an adverse title and there must be some positive act or acts from which the fact of such possession can be inferred. The mere fact that a person has enjoyed light and air because his neighbours did not build higher is not sufficient possession to come within section 3 of the Prescription Ordinance.

(3) That even in the Roman-Dutch Law the better view appeared to be that such a servitude could not be acquired by mere inaction or by the mere assertion by one party that the other has not got certain rights or by forbidding the other from exercising his right.

(4) That the decision in the case of *Neate* v. *Abrew*, 5 S.C.C. 126, is not a Full Bench decision as the appeal was heard only before two of the three Judges who delivered judgment. This decision is not one that can be regarded as authoritative.

(5) That the decision in *Pillay* v. *Fernando*, 14 N.L.R. 138, where the Court thought itself bound to follow *Neate* v. *Abrew*, should also not be followed.

Per BASNAYAKE, C.J.—(*A*) " It is now settled law that the Prescription Ordinance is the sole law governing the acquisition of rights by virtue of adverse possession, and that the common law of acquisitive prescription is no longer in force except as respects

the Crown. The question that arises in the instant case has, therefore, to be decided by reference to that Ordinance."

(*B*) "To satisfy the requirements of section 3, possession must be by an adverse title. The mere assertion by one party that another has not got certain rights or that he forbade the other to exercise such rights, even though the other may also acquiesce therein does not give rise to an adverse title whereon a claim of prescription can be based. Possession in the Ordinance has to be given its ordinary meaning, and the light and air that are enjoyed, because the neighbour has not built higher, cannot be said to be possessed by the land-owner who derives benefit therefrom. The opinion we have formed is in accord with the enactment and creates no hardship. In fact, it does away with the hardships that the hitherto reputed view of the Roman-Dutch Law created."

(*C*) "It would appear from the judgment in the South-African case, which is in Afrikaans and which has been read to me, and from the extracts from the commentators referred to in a note in Volume 74 of the South African Law Journal, at page 135 that there has been no judgment either of the Courts of Holland or South Africa wherein it has been decided that a negative servitude had been created by prescription. We are in entire agreement with the view of the learned author of the note that the creation of a negative servitude by prescription is subject to requirements which are so difficult to fulfil that the creation of such a servitude is a theoretical rather than a practical possibility."

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Can Supreme Court in appeal or by way of revision make use of section 325 *of Criminal Procedure Code without setting aside conviction entered.*

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Court consisting of only three judges—Only two of the three judges present at the hearing—Decision reported as Full Bench—Not binding on a subsequent Bench of two judges.

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Vendor and Purchaser

Vendor and purchaser—Sale of certain lands and undivided shares in others—Failure to get vacant possession of same—Right of purchaser to claim part of purchase price paid—"Incertum juris", meaning of—Time within which action for refund of purchase money for failure to give possession should be brought—Prescription Ordinance, section 6.

The plaintiff bought four allotments of land together with undivided shares in five other lands from the defendant. Being unable to obtain vacant possession thereof, the plaintiff instituted actions against the persons in possession but was unsuccessful in a majority of them. Thereafter he filed this action against his vendor, the defendant, for the recovery of part of the purchase money representing the value of the lands which he was unable to get possession of.

The District Judge dismissed his action on the ground that what was sold was an *incertum juris* and, therefore, the plaintiff was not entitled under the Roman-Dutch Law to recover the purchase price or any part thereof upon his failure to get possession of the properties purchased.

Held : (1) That what had been sold and purchased by the plaintiff was not an *incertum juris*, *i.e.*, not an expectation or a hazard, as, for instance, the cast of a net, but a thing itself.

(2) That the plaintiff was entitled to recover such part of the purchase price paid by him as was proportionate to the value of the lands of which he failed to get possession.

(3) That the obligation to deliver vacant possession to the vendee is, in law, an implied part of the written contract of sale and, therefore, the right to claim a refund of the purchase money should be determined by section 6 of the Prescription Ordinance, that is to say, in six years.

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Present : **Viscount Radcliffe, Lord Evershed, Lord Morris of Borth-Y-Gest, Lord Hodson, Lord Pearce.**

THE BRIBERY COMMISSIONER *vs.* PEDRICK RANASINGHE

From
THE SUPREME COURT OF CEYLON

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

DELIVERED THE 5TH MAY, 1964.

Ceylon (Constitution) Orders-in-Council, 1946 *and* 1947—*Bribery (Amendment) Act of* 1958—*Whether such Act could be construed as an amendment of the Constitution—Need for Speaker's certificate in regard to the two-thirds majority required for an amendment of the Constitution—Ceylon (Constitution) Order-in-Council,* 1946, *section* 29 (4)—*Effect of absence of such certificate.*

Bribery Tribunals—Setting up of such Tribunals by the Bribery (Amendment) Act of 1958—*Whether persons serving on such Tribunals " judicial officers " within the meaning of section* 55 *of the Ceylon (Constitution) Order-in-Council,* 1946—*Illegality of the appointment of such persons in the manner prescribed by the Bribery (Amendment) Act of* 1958, *without an amendment of the Constitution—Invalidity of orders made by such persons.*

Held : (1) That the Bribery (Amendment) Act of 1958 did not constitute an amendment of the Ceylon Constitution as it did not bear the certificate of the Speaker of the House of Representatives to show that it had been passed by a two-thirds majority, as required by the proviso to section 29 (4) of the Ceylon (Constitution) Order-in-Council of 1946. Any power given to the Ceylon Parliament by section 29 (4) was expressly subject to its proviso and in the case of amendment or repeal of the Constitution the Speaker's certificate was, therefore, a necessary part of the legislative process. A bill which did not comply with the condition precedent of the proviso would be invalid and *ultra vires* even though it had received the Royal Assent.

(2) That such provisions of the Bribery (Amendment) Act of 1958 as were in conflict with the Constitution were therefore invalid.

(3) That section 55 of the Ceylon (Constitution) Order-in-Council of 1946 was contravened when the Bribery (Amendment) Act of 1958 purported to create Bribery Tribunals for the trial of persons prosecuted for bribery. For the members of such Tribunals were " judicial officers " within the meaning of section 55 but were not appointed by the Judicial Service Commission as required by that section.

(4) That the members of such Tribunals were, therefore, not lawfully appointed and any orders made by them against the respondent in the present case were null and void.

Per THE JUDICIAL COMMITTEE :—(*A*) " The voting and legislative power of the Ceylon Parliament are dealt with in sections 18 and 29 of the Constitution.

' 18. Save as otherwise provided in sub-section 4 of section 29 any question proposed for decision by either Chamber shall be determined by a majority of votes of the Senators or Members, as the case may be, present and voting ' . . .

' 29. (1) Subject to the provisions of this order, Parliament shall have power to make laws for the peace, order and good government of the Island.

(2) No such law shall—

(*a*) prohibit or restrict the free exercise of any religion.'

There follow (*b*), (*c*) and (*d*) which set out further entrenched religious and racial matters, which shall not be the subject of legislation. They represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which *inter se* they accepted the Constitution ; and these are therefore unalterable under the Constitution. "

(*B*) " In the present case, on the other hand, the Legislature has purported to pass a law which being in conflict with section 55 of the Order-in-Council, must be treated, if it is to be valid, as an implied alteration of the constitutional provisions about the appointment of judicial officers. Since such alterations, even if express, can only be made by laws which comply with the special legislative procedure laid down in section 29 (4), the Ceylon Legislature has not got the general

power to legislate so as to amend its Constitution by ordinary majority resolutions, such as the Queensland Legislature was found to have under section 2 of its Constitution Act, but is rather in the position, for effecting such amendments, that that Legislature was held to be in by virtue of its section 9, namely compelled to operate a special procedure in order to achieve the desired result. "

(*C*) " No question of sovereignty arises. A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority, *e.g.*, when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the constitution there is only a bare majority if the constitution requires something more. The minority are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a two-thirds majority. The limitation thus imposed on some lesser majority of members does not limit the sovereign powers of Parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority. "

Cases referred to : *Attorney-General of Ceylon* v. *De Livera*, (1962) 64 N.L.R. 409 ; LXIII C.L.W. 1 ; (1963) A.C. 103 ; (1962) 3 W.L.R. 1413; (1962) 3 A.E.R. 1066

Senadhira v. *The Bribery Commissioner*, (1961) LX C.L.W. 65 ; 63 N.L.R. 313.

Great Western Railway Company v. *Bater*, (1922) 2 A.C. 1 ; 127 L.T. 170 ; 38 T.L.R. 448 ; 91 L.J.K.B. 472.

Edinburgh Railway Company v. *Wauchope*, (1841) 8 Cl. and F. 710.

Harris v. *Minister of Interior*, (1952) 2 S.A.L.R. 428.

McCawley v. *The King*, (1920) A.C. 691 ; 123 L.T. 177 ; 36 T.L.R. 387 ; 87 L.J.P.C. 130.

Attorney-General for New South Wales v. *Trethowan*, (1932) A.C. 526 ; 147 L.T. 265 ; 48 T.L.R. 514 ; 101 L.J.P.C. 158.

Thambiayah v. *Kulasingham*, (1948) 50 N.L.R. 25 ; XXXVIII C.L.W. 53.

The judgment of the Supreme Court is reported in LXIV C.L.W. 32.

Neil Lawson, Q.C., with *R. K Handoo*, *Ralph Millner*, *V. Tennekoon*, *Deputy Solicitor-General*, and *V. S. A. Pullenayagum*, *Crown Counsel*, for the appellant.

E. F. N. Gratiaen, Q.C., with *Montague Solomon* for the respondent.

LORD PEARCE

The appellant is the Bribery Commissioner of Ceylon on whom lies the duty of bringing prosecutions before the Bribery Tribunal which was created by the Bribery (Amendment) Act, 1958. The respondent was prosecuted for a bribery offence before that Tribunal. It convicted and sentenced him to a term of imprisonment and a fine. On appeal the Supreme Court declared the conviction and orders made against him null and inoperative on the ground that the persons composing the Bribery Tribunal which tried him were not lawfully appointed to the Tribunal. In the present case as in some earlier reported cases the Court took the view that the method of appointing persons to the Panel from which the Tribunal is drawn offends against an important safeguard in the Constitution of Ceylon.

The Constitution is contained in the Ceylon (Constitution) Orders-in-Council, 1946 and 1947. There is no need to refer in detail to the various Acts and Orders that established the independence of Ceylon. Viscount Radcliffe in *Attorney-General of Ceylon* v. *de Livera*, (1963) A.C. 103, at p. 118, said of the Constitution, " although there are many variations in matters of detail, its general conceptions are seen at once to be those of a parliamentary democracy founded on the pattern of the constitutional system of the United Kingdom ".

The Constitution does not specifically deal with the judicial system which was established in Ceylon by Charter of Justice of 1833 and is dealt with in certain Ordinances, the principal being the Courts Ordinance, Cap. 6. The power and jurisdiction of the Courts are, therefore, not expressly protected by the Constitution. But the importance of securing the independence of judges and of maintaining the dividing line between the judiciary and the executive was appreciated by those who framed the constitution. See the Ceylon Report of the Soulbury Commission on Constitutional Reform, Appendix I paragraphs 27 and 28 and Appendix II sections 68 and 69. Part 5 of the Constitution is headed, " The Executive " and Part 6 " The judicature ". Part 6 deals with the appointment and dismissal of judges. The judges of the Supreme Court are not removable except by the Governor-General on an address of the Senate and the House of Representatives, (section 52). So far as concerns the judges of lesser rank, section 55 provided that " the appointment, transfer, dismissal and disciplinary control of Judicial officers is hereby vested in the Judicial Service Commission ". The

Commission consists of the Chief Justice as Chairman and a judge of the Supreme Court and " one other person who shall be or shall have been a judge of the Supreme Court " [(section 53 (1)], and no Senator or Member of Parliament shall be appointed. Thus there is secured a freedom from political control and it is a punishable offence to attempt directly or indirectly to influence any decision of the Commission (section 56).

The questions before their Lordships are whether the statutory provisions for the appointment of members of the Panel of the Bribery Tribunal otherwise than by the Judicial Service Commission conflict with section 55 of the Constitution, and, if so, whether those provisions are valid.

In 1954, the Bribery Act was passed in order to meet a social need. It gave to the Attorney-General or officers authorised by him power to direct and conduct the investigation of any allegation of bribery, and certain powers for securing information and assistance. If there was a *prima facie* case, he was empowered to indict offenders who were not public servants before the ordinary Courts. Offenders who were public servants might either be so indicted or be arraigned before a Board of inquiry constituted from certain Panels to which members were appointed by the Governor-General on the advice of the Prime Minister. It had to decide whether the accused was guilty and it could order the guilty to pay the amount of the bribe as a penalty. A finding of guilt resulted in automatic dismissal and certain disqualifications and incapacities.

The Bribery Act of 1954 was treated by the legislature as coming within section 29 (4) of the Constitution which deals with any amendments to the Constitution, and there was endorsed on the bill, when it was presented for the Royal Assent, the necessary certificate of the Speaker. That Act also contained a section as follows :—

> " 2. (1) Every provision of this Act which may be in conflict or inconsistent with anything in the Ceylon (Constitution) Order-in-Council, 1946, shall for all purposes and in all respects be as valid and effectual as though that provision were in an Act for the amendment of that Order-in-Council enacted by Parliament after compliance with the requirement imposed by the proviso of sub-section (4) of section 29 of that Order-in-Council.
>
> (2) Where the provisions of this Act are in conflict or are inconsistent with any other written law, this Act shall prevail."

In 1958 radical changes were made. The Bribery (Amendment) Act, 1958, swept away the Boards of Inquiry which dealt with public servants and created Bribery Tribunals for the trial of persons prosecuted for bribery with power to hear, try, and determine any prosecution for bribery made against any person before the Tribunal. The Bribery Commissioner was brought into being and was empowered to prosecute persons before the Tribunal. All the offences of bribery specified in Part II of the Act, punishable with rigorous imprisonment for a term not exceeding seven years or a fine not exceeding Rs. 5,000/- or both became triable by the Tribunal Whether the effect was that the offences of bribery under Part 2 of the Act " were no longer triable by the Courts " as was said by Sansoni, J., in *Senadhira* v. *The Bribery Commissioner*, (1961) 63 N.L.R. 313, at 314, or that, as is contended by Mr. Lawson on behalf of the Bribery Commissioner, the Courts and the Tribunal have concurrent powers, is immaterial. No doubt, even if Mr. Lawson's contention on his behalf be correct, the practical effect would be to supersede the Court's jurisdiction in bribery cases to a large extent.

A bribery tribunal, of which there may be any number is composed of three members selected from a Panel (section 42). The Panel is composed of not more than fifteen persons who are appointed by the Governor-General on the advice of the Minister of Justice (section 41). The Members of the Panel are paid remuneration (section 45).

Mr. Lawson on behalf of the Bribery Commissioner argues that the members of the Tribunal are not " judicial officers " and that, therefore, their appointment by the executive does not conflict with the constitutional provision that the appointment of judicial officers is vested in the Judicial Service Commission. He bases the contention on two main grounds.

First he argues that the words " judicial officers" only apply to judges of the ordinary Courts referred to in the Courts Ordinance, Cap. 6, section 3, and do not apply to those excluded from the operation of the section by the proviso which sets out various other or lesser tribunals, ending with the words " or of any special officer or tribunal legally constituted to try any special case or class of cases ". If that argument were sound it might be open to the executive to appoint whom they chose to sit on any number of newly created tribunals which might deal with various aspects of the jurisdiction of the ordinary Courts

and thus, by eroding the Courts' jurisdiction, render section 55 valueless.

Section 55 (sub-section 5) defines the expression "judicial officer" as meaning the holder of any judicial officer but it does not include a judge of the Supreme Court or a Commissioner of Assize. By section 3 (1) of the Constitution "judicial office" means any paid judicial office. Membership of the Panels from which the Bribery Tribunals are constituted is expressly referred to in section 41 of the Bribery (Amendment) Act, 1958, as an "office". "Each member of the panel shall, unless he vacates office earlier . . ." (section 41 (2). Vacating "office" is also referred to in sub-sections 41 (4) and 41 (6). Both according to the ordinary meaning of words and according to the more precise tests applied by the House of Lords in *G.W.R.* v. *Bater*, (1922) 2 A.C. 1 at 15, membership of the Panel is an office. Their Lordships are unable to draw any inference from the Courts Act which would affect the plain meaning of section 55 of the Constitution.

Mr. Lawson's second argument is that although membership of the Panel is an office, it is not a "judicial" office, since the members are paid to be on the Panel and are not paid as members of the Tribunal. The Supreme Court rightly rejected this distinction. Clearly the members have the paid office of being on the Panel, the functions of the office being the performance of the judicial duties of the Bribery Tribunal as and when they are asked to sit.

There is, therefore, a plain conflict between section 55 of the Constitution and section 41 of the Bribery Amendment Act under which the Panel is appointed. What is the effect of this conflict ? The Supreme Court has held that it renders section 41 invalid. Mr. Lawson, however, contends on behalf of the Bribery Commissioner that, since the Act has been passed by both Houses and received the Royal Assent, it is a valid enactment and has the full force of law, amending the Constitution if and in so far as necessary. If, he argues, there has been a defect in procedure, that does not make the Act invalid, since the Ceylon Parliament is sovereign and had the power to pass it. Nor are the Courts able to look behind the Act to see if it was validly passed.

The voting and legislative power of the Ceylon Parliament are dealt with in sections 18 and 29 of the Constitution.

> "18. Save as otherwise provided in sub-section 4 of section 29 any question proposed for decision by either Chamber shall be determined by a majority of votes of the Senators or Members, as the case may be, present and voting" . . .
>
> "29. (1) Subject to the provisions of this order, Parliament shall have power to make laws for the peace, order and good government of the Island.
>
> (2) No such law shall—
>
> (*a*) prohibit or restrict the free exercise of any religion."

There follow (*b*), (*c*) and (*d*) which set out further entrenched religious and racial matters, which shall not be the subject of legislation. They represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which *inter se* they accepted the Constitution ; and these are, therefore, unalterable under the Constitution.

> "(3) Any law made in contravention of sub-section (2) of this section shall to the extent of such contravention be void."
>
> "(4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of Her Majesty in Council in its application to the Island.
>
> Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of Members of the House (including those not present).
>
> Every certificate of the Speaker under this sub-section shall be conclusive for all purposes and shall not be questioned in any Court of law."

The Bribery (Amendment) Act, 1958, contained no section similar to section 2 of the 1954 Act nor did the bill bear a certificate of the Speaker. There is nothing to show that it was passed by the necessary two-thirds majority. If the presence of the certificate is conclusive against such a majority there is force in the argument that its absence is conclusive against such a majority. Moreover where an Act involves a conflict with the constitution the certificate is a necessary part of the Act-making process and its existence must be made apparent.

The fact that the 1958 bill did not have a certificate and was not passed by the necessary majority was not really disputed in the Supreme Court or before Their Lordships' Board, but it has been argued that the Court, when faced with an official

copy of an Act of Parliament, cannot enquire into any procedural matter and cannot now properly consider whether a certificate was endorsed on the bill. That argument seems to Their Lordships unsubstantial, and it was rightly rejected by the Supreme Court. Once it is shown that an act conflicts with a provision in the Constitution the certificate is an essential part of the legislative process. The Court has a duty to see that the Constitution is not infringed and to preserve it inviolate. Unless, therefore, there is some very cogent reason for doing so, the Court must not decline to open its eyes to the truth. Their Lordships were informed by Counsel that there were two duplicate original bills and that after the Royal Assent was added one original was filed in the Registry where it was available to the Court. It was, therefore, easy for the Court, without seeking to invade the mysteries of Parliamentary practice, to ascertain that the bill was not endorsed with the Speaker's certificate.

The English authorities have taken a narrow view of the Court's power to look behind an authentic copy of the act. But in the constitution of the United Kingdom there is no governing instrument which prescribes the law-making powers and the forms which are essential to those powers. There was, therefore, never such a necessity as arises in the present case for the Court to take any close cognisance of the process of law-making. In *Edinburgh Railway Co.* v. *Wauchope*, (1841) 8 Clark and Finnelly, 710, at 725, however, Lord Campbell said : " All that a Court of justice can do is to look to the Parliamentary roll ". There seems no reason to doubt that in early times, if such a point could have arisen as arises in the present case the Court would have taken the sensible step of inspecting the original.

In the South African case of *Harris* v. *Minister of the Interior*, (1952) 2 A.S.A.R. 428, at 469, where a similar point arose, it appears that the Court itself looked at the bill. " The original " said Centlivres, C.J., " which was signed by the Governor-General and filed with the Registrar of this Court bears the following endorsement of the Speaker : ' certificate correct as passed by the joint sitting of both House of Parliament ' . . . ". Moreover the point on which Fernando, J., relied in the Supreme Court seems to their Lordships unanswerable. When the Constitution lays down that the Speaker's certificate shall be conclusive for all purposes and shall not be questioned in any Court of law, it is clearly intending that Courts of law shall look to the certificate but shall look no further. The Courts, therefore, have a duty to look for the certificate in order to ascertain whether the constitution has been validly amended. Where the certificate is not apparent, there is lacking an essential part of the process necessary for amendment.

The argument that by virtue of certain statutory provisions the subsequent reprint of an Act can validate an invalid Act cannot be sound. If Parliament could not make a bill valid by purporting to enact it, it certainly could not do so by reprinting it, however august the blessing that it gives to the reprint.

Mr. Lawson further contended that since the original Bribery Act of 1954 had on it a certificate, any amendment of that Act was automatically franked and did not need a certificate. The effect of that argument would be that serious inroads into the constitution could be made without the necessary majority provided that they were framed as amendments to some quite innocuous Act which had borne a certificate. No authority was cited on this point. Their Lordships feel no doubt that every amendment of the constitution, in whatever form it may be presented, needs a certificate under section 29 (4).

There remains the point which is the real substance of this appeal. When a Sovereign Parliament has purported to enact a bill and it has received the Royal Assent, is it a valid Act in the course of whose passing there was a procedural defect, or is it an invalid Act which Parliament had no power to pass in that manner.

The strongest argument in favour of the appellant's contention is the fact that section 29 (3) expressly makes void any act passed in respect of the matter entrenched in and prohibited by section 29 (4), whereas section 29 (4) makes no such provision, but merely couches the prohibition in procedural terms.

The appellant's argument placed much reliance upon the opinion of this Board in *McCawley* v. *The King*, (1920) A.C. 691. Just as in that case the legislature of the then Colony of Queensland was held to have power by a mere majority vote to pass an Act that was inconsistent with the provisions of the existing Constitution of the Colony as to the tenure of judicial office, so, it was said, the legislature of Ceylon had no less a power to depart from the requirements of a

section such as section 55 of the Order-in-Council, notwithstanding the wording of section 18 and section 29 (4). Their Lordships are satisfied that the attempted analogy between the two cases is delusive and that *McCawley's* case, so far as it is material, is, in fact, opposed to the appellant's reasoning. In view of the importance of the matter it is desirable to deal with this argument in some detail.

In 1869 Queensland had been granted a Constitution in the terms of an Order-in-Council made on 6th June of that year under powers derived by Her Majesty from the Imperial Statute, 18 and 19 Vic. C. 54. The Order-in-Council had set up a legislature for the territory, consisting of the Queen, a Legislative Council and a Legislative Assembly, and the law-making power was vested in Her Majesty acting with the advice and consent of the Council and Assembly. Any laws could be made for the " peace, welfare and good government of the Colony ", the phrase habitually employed to denote the plenitude of sovereign legislative power, even though that power be confined to certain subjects or within certain reservations. The Constitution thus established placed no restrictions upon the manner in which or the extent to which the law-making power could be exercised, either generally or for particular purposes, except for the provisions then customary as to reservation and disallowance of bills and a special provision as to the reservation of any bill which proposed the introduction of the elective principle into the make up of the Legislative Council. Subject to this the legislature was expressly given full power and authority to alter or repeal the provisions of the Order-in-Council " in the same manner as any other laws for the good government of the Colony ".

The Legislature exercised this power in 1867 and passed what was called the Constitution Act of that year. By section 2 of the Act the legislative body, again the Queen acting with the advice and consent of the Council and Assembly, was given or declared to have power to make laws for the peace, welfare and good government of the Colony in all cases whatsoever. The only express restriction on this comprehensive power was contained in a later section, section 9, which required a two-thirds majority of the Council and of the Assembly as a condition precedent to the validity of legislation altering the constitution of the Council. As to this Lord Birkenhead, L.C., delivering the Board's opinion remarked : " We observe, therefore, the Legislature in this isolated instance carefully selecting one special and individual case in which limitations are imposed upon the power of the Parliament of Queensland to express and carry out its purpose in the ordinary way by a bare majority ", (1920) A.C., at 712. This observation was coupled with the summary statement at page 714 : " The Legislature of Queensland is the master of its own household, except so far as its powers have in special cases been restricted. No such restriction has been established, and none in fact, exists, in such a case as is raised in the issues now under appeal ".

These passages show clearly that the Board in *McCawley's* case took the view, which commends itself to the Board in the present case, that a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the Legislature is sovereign, as is the Legislature of Ceylon, or whether the Constitution is " uncontrolled ", as the Board held the Constitution of Queensland to be. Such a Constitution can, indeed, be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with ; and the alteration or amendment may include the change or abolition of those very provisions. But the proposition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process. And this is the proposition which is in reality involved in the argument.

It is possible now to state summarily what is the essential difference between the *McCawley* case and this case. There the Legislature, having full power to make laws by a majority, except upon one subject that was not in question, passed a law which conflicted with one of the existing terms of its Constitution Act. It was held that this was valid legislation, since it must be treated as *pro tanto* an alteration of the Constitution, which was neither fundamental in the sense of being beyond change nor so constructed as to require any special legislative process to pass upon the topic dealt with. In the present case, on the other hand, the Legislature has purported to pass a law which being in conflict with section 55 of the Order-in-Council, must be treated,

if it is to be valid, as an implied alteration of the constitutional provisions about the appointment of judicial officers. Since such alterations, even if express, can only be made by laws which comply with the special legislative procedure laid down in section 29 (4), the Ceylon Legislature has not got the general power to legislate so as to amend its Constitution by ordinary majority resolutions, such as the Queensland Legislature was found to have under section 2 of its Constitution Act, but is rather in the position, for effecting such amendments, that that Legislature was held to be in by virtue of its section 9, namely, compelled to operate a special procedure in order to achieve the desired result.

The case of *The Attorney-General for New South Wales* v. *Trethowan*, (1932) A.C. 526, also needs to be considered. The Constitution Act, 1902 of New South Wales was amended in 1929 by adding section 7A to the effect that no bill for abolishing the Legislative Council (or repealing section 7A) should be presented for the Royal Assent until it had been approved by a majority of electors voting on a submission to them made in accordance with the section. Since both the Acts of 1902 and 1909 were Acts of the local legislature they were confined so far as legislative power was concerned, by the Colonial Laws Validity Act, 1864. Without complying with the requirements of section 7A both Houses passed Bills respectively repealing section 7A and abolishing the Legislative Council. The appeal was limited to the questions (see p. 528) " whether the Parliament of New South Wales has power to abolish the Legislative Council of the State or to alter its constitution or powers or to repeal section 7A of the Constitution Act, 1902, except in the manner provided by the said section 7A ". In holding that Bills could not lawfully be presented until the requirements of section 7A had been complied with, the Board relied on section 5 of the Colonial Laws Validity Act, 1865. That section provided that " every representative legislature shall in respect of the colony under its jurisdiction have . . . . . full power to make laws respecting the constitution powers and procedure of such legislature ; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Orders-in-Council, or Colonial law for the time being in force in the Colony ". The effect of section 5 of the Colonial Laws Validity Act, which is framed in a manner somewhat similar to section 29 (4) of the Ceylon Constitution was that where a legislative power is given subject to certain manner and form, that power does not exist unless and until the manner and form is complied with. Lord Sankey said (at p. 541) " A Bill within the scope of subsection 6 of section 7A which received the Royal Assent without having been approved by the electors in accordance with that section would not be a valid Act of the legislature. It would be *ultra vires* section 5 of the Act of 1865 ".

The careful judgment of Centlivres, C.J., with which the four other members of the Appellate Division of South Africa concurred, in the case of *Harris* v. *Minister of the Interior* (above) expresses the same point of view.

The legislative power of the Ceylon Parliament is derived from section 18 and section 29 of its Constitution. Section 18 expressly says " save as otherwise ordered in sub-section 4 of section 29 ". Section 29 (1) is expressed to be " subject to the provisions of this order ". And any power under section 29 (4) is expressly subject to its proviso. Therefore in the case of amendment and repeal of the Constitution the speaker's certificate is a necessary part of the legislative process and any Bill which does not comply with the condition precedent of the proviso, is and remains, even though it receives the Royal Assent, invalid and *ultra vires*.

No question of sovereignty arises. A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority, *e.g.*, when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the constitution there is only a bare majority if the constitution requires something more. The minority are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a two-thirds majority The limitation thus imposed on some lesser majority of members does not limit the sovereign powers of Parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority.

The case of *Thambiayah* v. *Kulasingham*, 50 N.L.R. 25, at 37, is authority for the view that where invalid parts of the statute which are *ultra vires* can be severed from the rest which is *intra vires* it is they alone which should be held invalid.

Their Lordships, therefore, are in accord with the view so clearly expressed by the Supreme Court " that the orders made against the respondent are null and inoperative on the grounds that the persons composing the Bribery Tribunal which tried him were not lawfully appointed to the Tribunal ". They will accordingly humbly advise Her Majesty to dismiss this appeal. In accordance with the agreement between the parties the appellant will pay their costs of the respondent.

Appeal dismissed.

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

N. M. S. OMER *vs.* M. L. D. CASPERSZ AND ANOTHER

In the matter of an Application for a Mandate in the nature of a Writ of Mandamus and of a Writ of Certiorari directed to the Principal Collector of Customs.
S.C. Application, No. 89 *of* 1963.

Argued on : 10th and 11th June, 1963.
Decided on : 28th June, 1963.

Certiorari and Mandamus—Imposition of penalty for importing prohibited and restricted goods—Duty to act judicially—Customs Ordinance, sections 8 (2), 43, 129, 144, 165.

The petitioner was the holder of a licence issued by the Controller of Imports to import certain watch spare parts from Switzerland. The petitioner claimed that on March 19, 1962, he had imported into Ceylon the goods covered by the licence. The petitioner was not permitted to pass a bill of entry in respect of these goods. He was instead served with a summons dated April 11, 1962, requiring him to appear before the respondent, the Principal Collector of Customs, on April 18, 1962, for the purpose of an inquiry under the Customs Ordinance, at which inquiry the petitioner was called upon *merely to identify the goods.*

By a letter of October 15, 1962, the respondent informed the petitioner that the goods imported on March 19, 1962, were forfeit in terms of section 43 of the Customs Ordinance by reason of the importation being contrary to the table of prohibitions and restrictions inwards. (This order was challenged by the petitioner in an action instituted by him in the District Court on November 12, 1962). The respondent further informed the petitioner that an additional forfeiture of Rs. 149,850/- had been imposed on him under section 129 of the Customs Ordinance, being a forfeiture of treble the value of the goods so imported, and called upon him to pay that amount on or before October 29, 1962.

This penalty not having been paid, on November 15, 1962, the respondent informed the petitioner by letter that in terms of section 144 of the Customs Ordinance, " I am taking steps to stop all your imports or goods you bring into or you are seeking to export or taking out of Ceylon until the additional forfeiture of Rs. 149,850/- is paid ".

Meanwhile, in August, 1962, the petitioner had applied for and obtained from the Controller of Imports another licence to import certain watch spare parts from Hong Kong. These goods reached Ceylon in September, 1962, but the petitioner was not permitted to pass bills of entries. It was not denied by the respondent that in compliance with the letter of November 15, 1962, the petitioner was being prevented from removing these goods.

Thereupon, the petitioner applied to the Supreme Court for the issue of Writs of *Certiorari* and *Mandamus* to quash the imposition of the additional forfeiture of Rs. 149,850/- and to compel the respondent to permit the petitioner to present bills of entry in respect of goods other than those said to be forfeit.

Section 129 of the Customs Ordinance reads as follows :—

"Every person who shall be concerned in importing or bringing into Ceylon any prohibited goods, the importation of which is restricted, contrary to such prohibition or restriction, and whether the same be unshipped or not, and every person who shall unship or assist, or be otherwise concerned in the unshipping of any goods which are prohibited, or of any goods which are restricted and imported contrary to such restriction, or of any goods liable to duty, the duties for which have not been paid or secured, or who shall knowingly harbour, keep or conceal, or shall knowingly permit, or suffer, or cause, or procure to be harboured, kept, or concealed, any such goods, or any goods which have been illegally removed without payment of duty from any warehouse or place of security in which they may have been deposited, or into whose hands and possession any such goods shall knowingly come, or who shall assist or be concerned in the illegal removal of any goods from any warehouse or place of security in which they shall have been deposited as aforesaid, or who shall be in any way knowingly concerned in conveying, removing, depositing, concealing, or in any manner dealing with any goods liable to duties of customs with intent to defraud the revenue of such duties or any part thereof, or who shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of such duties or any part thereof, shall in each and every of the foregoing cases forfeit either treble the value of the goods, or the penalty of one thousand rupees, at the election of the Collector of Customs.

Held : (1) That the officer of the Customs conducting an inquiry under section 129 must act judicially, and the liability of a person to a penalty of forfeiture must be objectively assessed on an evaluation of the evidence on oath of the persons examined at such inquiry.

Accordingly,

(*a*) since there was no inquiry at which the petitioner had an opportunity to show that by importing the goods in question he had not acted in contravention of law, the imposition of the additional forfeiture of Rs. 149,850/- was declared to be of no legal effect and was quashed by *Certiorari* ; and

(*b*) since the refusal of the respondent, relying onsection 144, to pass goods imported by the petitioner was without authority,

a writ of mandamus was issued to compel the respondent to perform his implied statutory duty to permit the petitioner to present bills of entry, etc., and remove goods which are not claimed to be forfeit.

Per T. S. Fernando J.—" Large powers reposed by Parliament in public officers must be execrised in a responsible manner and not forgetful of a sense of fairness. "

Cases referred to : *Palasamy Nadar* v. *Lanktree*, (1949) 51 N.L.R. 520; XLI C.L.W. 67
Tennekoon v. *The Principal Collector of Customs*, (1959) 61 N.L.R. 232 ; LIX C.L.W. 36.

H. W. Jayewardene, Q.C., with *L. Bartlett*, for the applicant.

H. L. de Silva, Crown Counsel, for the respondents.

T. S. Fernando, J.

The papers filed on this application reveal facts which are set out hereunder :—

The petitioner on or about March 2, 1962, applied to the Controller of Imports for a licence to import certain watch spare parts from Switzerland described in an indent (marked X. 1) and was granted a licence therefor. The petitioner claims that he imported into Ceylon on or about March 19, 1962, in four parcels the goods described in indent X. 1 which are covered by the import licence. He was not permitted to pass a bill of entry in respect of the goods so imported, but was served with a summons dated April 11, 1962, purporting to be issued under section 8 (2) of the Customs Ordinance (Cap. 235) requiring him to appear before the Collector on April 18, 1962, " as your evidence is necessary for the purpose of an inquiry to be held into the seizure of parcels Nos. Chiasso Air 42/1, 42/2, 42/3 and 42/4 by my officer at parcel post ".

The petitioner states that he attended as required by the summons aforesaid and an officer of the Customs Department questioned him as to whether the four parcels were consigned to him. He alleges that apart from calling upon him to identify the goods, by which I understand that he was only asked whether he was the importer of the goods, no other inquiry was held by any officer of Customs on that day. This allegation stands uncontradicted in the affidavits filed on behalf of the respondents on this present application.

Thereafter, in August, 1962, the petitioner applied for and obtained another licence to import certain watch spare parts, this time from Hong Kong, described in indent (marked B) and goods on this indent appear to have reached Ceylon in September, 1962. The petitioner alleges that he has not been permitted to pass bills of entries in respect of goods imported on indent B although certain customs duties aggregating to a sum of Rs. 24,675.57 have been collected from him by the respondents.

The respondents claim that the goods imported in March, 1962, are forfeit in terms of section 43 of the Customs Ordinance by reason of the importation being contrary to the table of prohibitions and restrictions inwards. The decision of this Court in *Palasamy Nadar* v. *Lanktree*, (1949) 51 N.L.R. 520, emphasizes that where an importation contrary to prohibitions and restrictions takes place the forfeiture is automatic and that no adjudication declaring the forfeiture to have taken place is required to implement that automatic incident of forfeiture. In practice, however, the importer is informed of the forfeiture and that information naturally is so conveyed some time after the importation. The petitioner appears to have been informed of the forfeiture by a letter of October 15, 1962, but, if the importation was unlawful, the forfeiture in my opinion actually took effect on March 19, 1962, The validity of the seizure of the goods imported on indent X. 1 is being canvassed by the petitioner in the District Court of Colombo, in case No 1052/Z, instituted by him after notice of action claimed to have been given in pursuance of section 154 of the

Customs Ordinance. I am not called upon in these proceedings, and I do not intend, to consider here the validity of the forfeiture of the said goods.

It would appear that the Crown has made in D.C. Colombo, Case No. 1052/Z, a claim in reconvention in respect of a sum of Rs. 149,850/- said to be due to it from the petitioner, being a forfeiture of treble the value of the goods imported on indent X. 1 on March 19, 1962. By the letter of October 15, 1962, addressed by the Principal Collector to the petitioner, and referred to by me above, the Collector informed him that an additional forfeiture of Rs. 149,850/- has been imposed on him under section 129 of the Customs Ordinance, and called upon him to pay that additional forfeiture on or before October 29, 1962. The validity of the forfeiture of this sum will, no doubt, arise for consideration in the District Court in the above-mentioned case. The same question, however, arises before me on the present application by reason of certain action which I shall now refer to, and which followed the receipt by the petitioner of this letter of October 15, 1962.

On November 12, 1962, the petitioner gave notice of action against the forfeiture of the goods imported on indent X. 1. By letter dated November 13/15, 1962, the Principal Collector informed the petitioner as follows :—

> " Further to my letter of even number of 15.10.62 I have the honour to inform you that under section 144 of the Customs Ordinance (Chapter 235), I am taking steps to stop all your imports or goods you bring into or you are seeking to export or taking out of Ceylon until the additional forfeiture Rs. 149,850/- is paid."

It is not denied that action is being taken on this letter and that the petitioner is being prevented from removing goods consigned to him and which are covered by valid licences and in respect of which the petitioner is willing to pay the appropriate customs duties and to deliver the requisite bills of entry. Although the prayer in the petition before me was one in respect of a Writ of Mandamus " to compel the Principal Collector to deliver to the petitioner the goods which have been seized and forfeited by the Principal Collector by his order of 15th October, 1962 and 15th November, 1962," it became manifest in the course of the argument that the prayer in that form was misconceived. I, therefore, permitted the petitioner to amend his prayer to one in respect of a Writ of Mandamus to compel the Principal Collector of Customs to permit the petitioner to present bills of entry in respect of goods other than those said to be forfeit by reason of importation contrary to the prohibitions and restrictions inwards and to remove the said goods on payment of Customs and other dues and on compliance with other relevant requirements of law. It is manifest that no writ of mandamus can issue on the Collector to deliver goods claimed to be forfeited where the validity of the forfeiture is yet awaiting adjudication by the appropriate tribunal.

I can now turn my attention to the real grievance of the petitioner on this application. Section 144 of the Customs Ordinance enacts as follows :—

> " If any person fails to pay any sum of money which he, under this Ordinance, has forfeited, or becomes liable to forfeit or to pay as a penalty, the officers of Customs may refuse to pass any goods which that person imports or brings into or is seeking to export or take out of Ceylon until that sum is paid.
>
> Provided that nothing in the preceding provisions of this section shall be deemed to prohibit the recovery of such sum by the Collector under any other provision of law."

If the petitioner has forfeited or become liable to forfeit or to pay as a penalty the sum of Rs. 149,850/- specified in the letter of November 13/15, 1962, referred to above, then it is not open to this Court to seek to prevent the action of the Collector in refusing to pass the goods imported by the petitioner. The petitioner, however, claims that the alleged additional forfeiture of Rs. 149,850/- referred to in the Collector's letter of October 15, 1962, is null and void. He relies on the decision of this Court in *Tennekoon* v. *The Principal Collector of Customs*, (1959) 61 N.L.R. 232, where Weerasooriya, J., observed that the liability of a person to a penalty or forfeiture under section 127 (now 129) of the Customs Ordinance has to be objectively assessed on an evaluation of the evidence on oath of the persons examined at the inquiry and that the officer of the Customs concerned has to act judicially. The only inquiry held before the forfeiture of Rs. 149,850/- was imposed on October 15, 1962, was the inquiry to which the petitioner was summoned for April 18, 1962. It is not disputed, so far as the papers before me disclose, that all that transpired on that day was a questioning of the petitioner confined to ascertaining whether it was the petitioner who imported the goods. It may be mentioned here that the indent was in favour of " Fareeda Jewel-

lers ". There was nothing done on that day to ascertain whether the goods actually imported were different from the goods authorised by the licence to be imported into Ceylon.

Weerasooriya, J., in the case referred to above held that, as no opportunity had been given to the person there concerned to meet the case against him at the inquiry held, the findings reached by the officer of Customs were of no legal effect. Learned Crown Counsel for the respondents contended that the decision in *Tennekoon* v. *The Principal Collector of Customs* (*supra*) is wrong, and that it should be reconsidered. He argued that the Collector acts in terms of that section throughout in an executive capacity without attracting to his functions the duty to act judicially, and that the expression " at the election of the Collector of Customs " in section 129 means no more than an election which is purely subjective. I do not consider it necessary for me to embark upon a fresh consideration of the nature of the duty imposed on the Collector by section 129. I am content for the purposes of the present application respectfully to follow the decision relied on by the petitioner. Applying that authority I am compelled to reach the conclusion that the imposition of the additional forfeiture of Rs. 149,850/- is of no legal effect. It is pertinent to point out here that the decision in that case was delivered by this Court on February 23, 1959. As it has hitherto remained unreversed, the plain duty of the public officer is to conduct himself in accordance with that decision. The facts before me do not show that there was an inquiry at which the petitioner had an opportunity to show that by importing the goods in question he had not acted in contravention of law.

It was pointed out to me by learned Crown Counsel that the petitioner had not sought on this application an order in the nature of a writ of *certiorari*. Intervention by way of *certiorari* arises only incidentally on this application for mandamus, but in order not to defeat the ends of justice through some technical flaw in the application, I permitted the petitioner to amend his application by including a prayer for intervention by way of *certiorari* to effect a quashing of the order of November 13/15, 1962, in so far as it relates to the additional forfeiture.

If, then, the imposition of the additional forfeiture is of no legal effect, the refusal to pass goods relying on section 144 of the Customs Ordinance is without authority. The resulting position is that the Principal Collector of Customs has refused to perform his implied statutory duty to permit this importer to present bills of entry and remove goods after payment of Customs and other dues and after complying with other relevant requirements of the law. In that view of the matter, the contention of learned Crown Counsel that the remedy of mandamus is not available because mandamus does not lie to effect an undoing of what has already been done is irrelevant. I feel it is right to add that the order complained of is harsh in the extreme and amounts virtually to a throwing of the petitioner out of business. Large powers reposed by Parliament in public officers must be exercised in a responsible manner and not forgetful of a sense of fairness. In this case it should have been apparent to the Principal Collector by November 13/15, 1962, that the petitioner was not accepting the position that he had imported goods contrary to prohibitions and restrictions inwards or not covered by the licence. While the question upon which the validity of the forfeiture of Rs. 149,850/- depended was being brought up in a Court having jurisdiction to make a binding adjudication thereon, it does not appear to be fair that obstacles should be placed in the way of the importer doing business lawfully. While I have thought it necessary to make these observations here, I must emphasize that the claim for a mandamus is being decided by me not on the ground of alleged unfairness but solely on the point whether the public officer has refused to perform his statutory duty.

Another objection raised to intervention by this Court by way of mandamus was based on the principle that mandamus, being a discretionary remedy, should not issue where another remedy

was available. It was contended that there was a remedy by way of application in terms of section 165 of the Ordinance to the Minister for mitigation or remission of penalties. The restriction of any goods seized as forfeit does not arise here because what is now in dispute is "the section 144 order", if I may so term it, of November 13/15, 1962. As I interpret the powers of the Minister conferred by section 165, they do not include a power to cancel or vary an order which is not a forfeiture or a penalty or a fine. An order of an officer of Customs refusing to pass goods until a sum of money declared forfeited or imposed as a penalty is first paid is not an order reviewable by the Minister.

For reasons which I have indicated above, I direct that an order be issued on the 2nd respondent, who is the present Principal Collector of Customs, to permit the petitioner to present bills of entry and other relevant documents and remove goods which are not claimed to be forfeit as having been imported contrary to prohibitions and restrictions inwards or on any other grounds, on payment of the appropriate Customs and other dues and on compliance with other requirements of law.

The petitioner is entitled to the costs of this application.

Application allowed.

Present : **Abeyesundere, J.**

ROMIEL *vs.* DE SILVA, REVENUE & WORKS OVERSEER, T. C. RAKWANA*

S.C. No. 781—*M.C. Rakwana, No.* 87323.

Argued and decided on : 27th April, 1964.

Local Authorities (Standard By-laws) Act, No. 6 of 1952, (*Cap.* 261) *section* 3 (1), *by-law, framed thereunder—By-law prohibiting sale of vegetables, etc., within the market area except at the public market adopted by resolution and published in Gazette dated* 11*th November*, 1960—*Market area declared only on* 23*rd February*, 1963—*Validity of such by-law—Town Councils Ordinance*, (*Cap.* 256), *sections* 151 (3) *and* 156 (11) (*a*).

The appellant was charged and convicted under By-Law 16 (1) of Part XV of the Standard By-Laws framed under the Local Authorities (Standard By-Laws) Act No. 6 of 1952, for selling vegetables in the market area of the Rakwana Town Council at a place other than the public market of that town. This by-law was adopted by a resolution of the Rakwana Town Council under section 151 (3) of the Town Councils Ordinance and published in *Gazette*, No. 12226 of 11th November, 1960, on which day it came into operation.

It was contended in appeal that the by-law in question was invalid as the Town Council had no power to make that by-law inasmuch as the market area for the town was not declared till 23rd February, 1963.

Held : That the by-law in question was invalid in law, as the assigning of the market area, which is one of the circumstances required by section 151 (3) of the Town Councils Ordinance (Cap. 256) to enable the Rakwana Town Council to make it, had not not taken place at the time it was brought into force.

H. W. Jayewardene, Q.C., with *L. C. Seneviratne*, for the accused-appellant.

Colvin R. de Silva with *U. B. Weerasekera*, for the complainant-respondent.

ABEYESUNDERE, J.

The appellant was charged with having contravened By-law 16 (1) of Part XV of the Standard By-laws framed under section 2 of the Local Authorities (Standard By-laws) Act and adopted by the resolution of the Rakwana Town Council published in *Gazette*, No. 12226 of 11th November, 1960, by selling vegetables in the market area of the Rakwana Town at a place other than the public market of that town.

* For Sinhala translation, see Sinhala section Vol. 8, part 1, p. 1

Mr. H. W. Jayewardene, Q.C., who appeared for the appellant, submitted as a matter of law that the said by-law was invalid. He referred to section 151 (3) of the Town Councils Ordinance which provides that in any case in which the Town Council is satisfied that sufficient facilities are afforded for the public requirements of the market area by the public market, the Council may by by-law prohibit the sale of meat, poultry, fish, fruit or vegetables within the market area except at such public market. I have omitted such provisions of the said section as are irrelevant to the case under consideration.

According to section 3 (1) of the Local Authorities (Standard By-laws) Act, standard by-laws which are adopted by a local authority come into force within the administrative limits of that local authority with effect from the date of the publication in the *Gazette* of the resolution by which those standard by-laws were adopted by such local authority or on such later date as may be specified in such resolution. The resolution by which the Rakwana Town Council adopted the standard by-laws did not specify a date of operation. Therefore, the standard by-laws adopted by the Town Council came into operation on the date on which such resolution was published in the *Gazette*, namely, the 11th November, 1960. The said By-law 16 which contains the prohibition which the appellant is alleged to have defied was adopted and came into force at a time when there was no market area defined for the Town of Rakwana. The market area for that town was declared only on 23rd February, 1963. Section 156 (11) (*a*) of the Town Councils Ordinance which contains the enabling provisions for the making of by-laws in respect of public markets provides that the declaration of a market area and the prohibition of sales within such area shall be in accordance with section 151 of the Town Councils Ordinance. The last-mentioned section requires the existence of a market area and the satisfaction of the Town Council that sufficient facilities are afforded for the public requirements of the market area by the public market to enable the Town Council to make a by-law prohibiting the sale of meat, poultry, fish, fruit or vegetables within the market area except at the public market, or, if the Town Council so determines, except at such market and such other authorized premises.

The circumstances which would enable the Rakwana Town Council to make the said by-law 16 were not present at the time that the by-law was brought into force. Therefore, in law the Town Council had no power to make that by-law. I hold that the said by-law 16 is invalid.

The appeal from the conviction of, and the sentence passed on, the appellant must therefore be allowed. I quash the conviction, set aside the sentence and acquit the appellant.

Accused acquitted.

IN THE COURT OF CRIMINAL APPEAL

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

THE QUEEN *vs.* K. Y. SIRIPINA

Appeal No. 42 *of* 1962 *with Application No.* 46 *of* 1962—*S.C. No.* 405, *M.C. Ratnapura, No.* 78048.

Argued and decided on : September 4, 1962.

Oaths Ordinance, sections 4, 9—*Evidence Ordinance, section* 118—*Evidence of witness recorded without administering oath or affirmation—Requirement that oath or affirmation essential once Court is satisfied that a person is competent to testify—Meaning of word " omission " in section* 9 *of Oaths Ordinance—Whether it covers cases of deliberate omission.*

Held : (1) That once a Court is satisfied that a person is competent to testify in a case, then such person must be required to make oath or affirmation before being examined as a witness. His testimony cannot otherwise be regarded as legal evidence except in a case covered by section 9 of the Oaths Ordinance.

(2) That the "omission to take any oath or make any affirmation" contemplated in section 9 of the Oaths Ordinance is an accidental omission. It does not cover the case of a deliberate non-administration of an oath or affirmation.

Not followed : *The King* v. *Dingo*, (1948) 50 N.L.R. 193 ; XXXIX C.L.W. 52.
Mohamed Sugal Esa Mamasan Rer Alalah, (1946) A.C. 57.

Followed : *The King* v. *Ramasamy*, (1941) XXI C.L.W. 83 ; 42 N.L.R. 579.
The King v. *Jeeris*, (1905) 1 Bal. Reps. 185.
The Queen v. *Buye Appu*, (1883) Wendt Reps. 136.

K. Viknarajah (*assigned*), for the accused-appellant.

Vincent T. Thamotheram, Deputy Solicitor-General, for the Attorney-General.

BASNAYAKE, C.J.

It is common ground that the only evidence in the case is the evidence of the boy, K. Y. Premadasa. The learned trial Judge after questioning the boy made the following order :—

"I order that in view of the fact that the witness does not seem to understand the meaning of the words of the affirmation that his evidence be recorded without the witness being affirmed."

The boy was 11 years of age, and his evidence was taken without the oath or affirmation being administered. Section 4 (1) (*a*) of the Oaths Ordinance provides that all witnesses shall make an oath or affirmation. Section 118 of the Evidence Ordinance provides that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Once the Court is satisfied that a person is competent to testify, then such a person must be required to make an oath or affirmation before being examined as a witness. Except in the cases covered by section 9 of the Oaths Ordinance, the testimony of a witness competent to testify who does not take an oath or affirmation cannot be regarded as legal evidence. Section 9 reads—

"No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission, substitution, or irregularity took place, or shall affect the obligation of a witness to state the truth."

The cases of *The Queen* v. *Buye Appu*, Wendt, p. 136, at 140 (F.B.) ; *The King* v. *Jeeris*, (1 Balasingham Reports, 185) and *The King* v. *Ramasamy*, (42 N.L.R. 529) all support that view. In the case of *The King* v. *Jeeris* (*supra*), the effect of section 9 (then section 10) of the Oaths Ordinance was considered. It was held by a full Bench that once the Judge has elected to take the statement of a person as evidence, he has no option but to administer either an oath or affirmation to such person as the case may require, and that the omission contemplated in section 9 is an accidental omission. In the case of *The King* v. *Ramasamy* (*supra*) it was held that a deliberate non-administration of an oath or an affirmation does not amount to an act of omission within the meaning of section 9. In the case of *The King* v. *Dingo*, (50 N.L.R. 193), following a decision of the Privy Council in the case of *Mohamed Sugal Esa Mamasan Rer Alalah*, (1946 Appeal Cases 57), it was held that section 9 applied not only to cases of accidental omission to administer the oath, but also to cases of deliberate omission. We find ourselves unable to subscribe to that view and we prefer the view taken in the earlier cases.

We, therefore, hold that the failure of the Judge to require the witness, Premadasa, to make an oath or affirmation renders the statements made by him in Court inadmissible in evidence.

We accordingly quash the conviction and direct that a judgment of acquittal be entered.

Conviction quashed.

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

DAVID *alias* LOKUMAHATMAYA *vs.* POLICE INSPECTOR, MARAWILA*

S.C. 677-678/'63—*M.C. Matara, Case No. D* 4490.

Argued and decided on : 29th November, 1963.

Criminal Procedure Code, sections 304, 325 (1) (*b*), 338 (1)—*Conditional discharge—Accused bound over to be of good behaviour—Right of Appeal.*

Held : That where an accused person is bound over under section 325 (1) (*b*) of the Criminal Procedure Code to be of good behaviour and to appear for conviction and sentence when called upon to do so, such an order is neither a " judgment " nor a " final order " of a Magistrate's Court. Accordingly, there is no right of appeal from such order.

Followed : *Cassim* v. *Abdurasak*, 38 N.L.R. 428 ; VIII C.L.W. 75
Fernando v. *Seneviratne*, 48 N.L.R. 431.

N. M. S. Jayawickrama, for the accused-appellants.

D. S. Wijesinghe, Crown Counsel, for the Attorney-General.

L. B. DE SILVA, J.

An objection has been taken to this appeal on the ground that the 2nd and 3rd accused-appellants were only bound over under section 325 (1) (*b*) of the Criminal Procedure Code to be of good behaviour and to appear for conviction and sentence when called upon.

It has been brought to my notice that there are conflicting decisions for and against an appeal from such an order. The accused would be entitled to appeal under section 338 (1) of the Criminal Procedure Code from a judgment or final order of the Magistrate's Court. Clearly, an order under section 325 (1) (*b*) is not a final order in the meaning given to a final order in the case reported in 2 Balasingham's Reports, page 122. It was a case decided before three judges.

This order did not terminate the proceedings and it was open to the accused not to enter into a conditional bond if they so desired, and in that event the magistrate would have passed sentence on them according to law. Even after the bond is entered into it is open to the magistrate to take certain steps against the accused, if they fail to fulfil the conditions during the period of the bond, and in such an event, proceed to a conviction of the accused and to sentence them for the offence which they had committed. The other question is whether this could be considered a judgment of the Magistrate's Court. The Criminal Procedure Code gives no definition of a judgment, but Chapter 24, which relates to a judgment, under section 304 enacts that a judgment in every trial under this Code shall be pronounced in open Court either immediately after the verdict is recorded or at some subsequent time of which due notice shall be given to the parties or their pleaders. With regard to a Magistrate's Court, section 190 provides for a verdict. The magis-

*For Sinhala translation, see Sinhala section Vol. 8 part 1. p. 3

trate if he finds an accused not guilty shall forth with record a verdict of acquittal ; if he finds an accused guilty he shall forthwith record a verdict of guilty and pass sentence upon him according to law. In a case under section 325 (1) (*b*), magistrate does not enter in a verdict finding an accused guilty but before proceeding to conviction he proceeds to make an order of discharge under this provision.

In this case, I hold that there is no judgment of the learned magistrate within the meaning of section 338 (1) from which an accused could appeal to this Court. I follow the decisions in 38 N.L.R., 428 ; 48 N.L.R., 431, and uphold the objection.

The appeals are rejected.

Appeals rejected.

Present : **Abeysundere, J.**

WADIVELU *vs.* KANAGARATNAM*

S.C. 351/1963—*M.C. Nuwara Eliya*, 24715.

Argued and decided on : September 5, 1963.

Criminal Procedure Code, sections 148 (1) (*b*), 148 (1) (*d*), 151 (2)—*Accused produced otherwise than on summons or warrant—Failure of Magistrate to hold the examination directed by section* 151 (2) *forthwith.*

Held : That when an accused person is brought before Court in custody without process, the failure of the Magistrate to examine the Police Officer so producing him on oath on the same day, constitutes a failure to hold the examination directed by section 151 (2) of the Criminal Procedure Code and vitiates the subsequent proceedings.

T. W. Rajaratnam, for the accused-appellant.

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

ABEYSUNDERA, J.

The appellant in this case was brought before the Magistrate of Nuwara Eliya on December 9, 1962, in custody without process, accused of having committed theft. He was brought by Police Constable Pallewela of the Ragala police station. The Magistrate did not forthwith examine the police constable on oath in regard to the facts relating to the alleged offence. He allowed the appellant bail. On January 17, 1963, a report under section 148 (1) (*b*) of the Criminal Procedure Code was filed in the Magistrate's Court of Nuwara Eliya by the Officer-in-Charge of the Ragala police station accusing the appellant of having committed house-breaking by night and theft. Thereafter two witnesses were examined and charges were framed against the appellant.

Proceedings against the appellant were first instituted in the Magistrate's Court of Nuwara Eliya, on December 9, 1962, as provided in section 148 (1) (*d*) of the Criminal Procedure Code, when the appellant was brought before that Court in custody without process, accused of having committed an offence. The failure of the Magistrate on that occasion to examine Police Constable Pallewela on oath constitutes a failure to hold the examination directed by section 151 (2) of the Criminal Procedure Code.

I, therefore, set aside the conviction of the appellant and the sentence passed on him and order that he be retried before another Magistrate.

Set aside and sent back.

* For Sinhala translation, see Sinhala section, Vol. 8 part 1, p. 2

Present : **Basnayake, C.J., Weerasooriya, S.P.J., and T. S. Fernando, J.**

M. A. DANIEL APPUHAMY *vs.* T. B. ILANGARATNE & OTHERS

In the matter of an appeal under section 82A of Ceylon (Parliamentary Elections) Order-in-Council, 1946, as amended by Ceylon Parliamentary Elections (Amendment) Acts, No. 19 of 1948 and No. 11 of 1959.

Election Petition Appeal, No. 1 of 1963.

Election Petition, No. 8 of 1960 (Hewaheta).

Argued on : October 21, 22, 23, 24 and 25, and December 9, 10, 12 and 13, 1963.
Decided on: 17th February, 1964.

(A) Evidence Ordinance, sections 123, 162—Interpretation of expression "affairs of State"—Ceylon (Parliamentary Elections) Order-in-Council, 1946—Petition containing charge of corrupt practice within the meaning of section 58 by appellant (unsuccessful candidate) against respondent—Corrupt practice alleged relating to publication of false statements of fact in relation to personal character of appellant by respondent and his agents before and during election—Attempt by appellant to prove such statements by producing reports of speeches made at election meetings forwarded by police officers attending such meetings to their superiors on special instructions—Claim of privilege from production taken under section 123 of the Evidence Ordinance—Claim supported by affidavit from Inspector-General of Police—Order by trial judge upholding claim—Validity of the order.

This was an appeal under section 82A of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, as amended by section 24 of the Ceylon Parliamentary Elections (Amendment) Act, No. 11 of 1959, by the petitioner who unsuccessfully presented a petition under section 79 of the aforesaid Order-in-Council challenging the election of the 1st respondent to the House of Representatives as member for Hewaheta.

In his petition the petitioner prayed : (*a*) that a recount of the votes be ordered before the trial ; (*b*) that a declaration be made by the Court that the return of the 1st respondent as a member at the said election was null and void on the ground of—

(i) the commission of the offence of undue influence as defined in section 56 of the Ceylon (Parliamentary Elections) Order-in-Council, 1946 ; and

(ii) the commission of a corrupt practice within the meaning of section 58 of the same Order-in-Council in that the 1st respondent by himself or his agents published before or during the said election, false statements of fact in relation to the personal character of the petitioner for the purpose of affecting the return of the petitioner at the said elections.

After trial the petition was held by the Election Judge to have failed on all grounds and the 1st respondent was held to have been duly elected and returned.

In the petition of appeal filed, the appellant sought to have the findings of the Election Judge on the charges of undue influence and corrupt practices set aside on various grounds of law.

At the hearing of the appeal the Counsel for the appellant restricted himself to arguing that the dismissal of the charge of corrupt practice of making false statements in relation to the petitioner's personal character was vitiated by an order made by the trial judge upholding an objection taken to the production of certain documents in the custody of a police officer.

The documents in question which the petitioner desired to produce at the trial, according to the evidence, consisted of reports made in the following circumstances. Certain police officers were assigned the duty of attending election meetings in the electoral area in question and making notes of the speeches that were made whenever the speakers " spoke disparagingly of the Government " or " if any person was reprimanded or if some speaker said anything against a person." Not more than one officer made such notes at any single meeting. After the meeting was over the procedure was for the officer to go back to the police station and prepare five copies of a report (within twenty-four hours) and hand them over to the officer-in-charge, who had to forward them to the Superintendent of Police of the district—Kandy.

Three constables of the Talatuoya Police Station were present at seven election meetings held within its area and they made their respective reports as aforesaid.

The petitioner summoned the officer-in-charge of the said Police Station and the Superintendent of Police, Kandy, to produce or cause to be produced at the trial the reports of the said three constables containing the notes of the speeches made at the meetings attended by them. The officer, who brought the reports to Court in obedience to the summons claimed privilege from production under section 123 of the Evidence Ordinance. This claim was supported by an affidavit from the Inspector-General of Police, stating *inter alia* that the said documents " are unpublished official records relating to affairs of State and belong to a class of documents the practice of keeping which secret is necessary for the proper functioning of the Public Service " and that after a careful consideration of the said documents he was of opinion that it would be injurious to the public interest if the said documents were to be produced.

After argument, the Election Judge purporting to follow a decision of the Lahore High Court in *Nazir Ahmed* v. *Emperor*, A.I.R., (1944) Lahore 434, refused permission for the production of the reports on the ground that the words " any matter of State " in section 123 of the Evidence Ordinance should be given a wide interpretation and that " any matter which appertains to the exercise of governmental or administrative functions is an affair of State ".

Two questions were argued before Their Lordships :—

(*a*) Whether the learned Election Judge was wrong in not permitting the production in evidence of the said reports ;

(*b*) if so, whether the charge of committing the corrupt practice aforesaid should be ordered to be tried anew.

Held : (1) That the said reports are not " unpublished records " as they are records of speeches made in public ; nor do they relate to " affairs of State " within the meaning of section 123 of the Evidence Ordinance as this expression should be limited to matters relating to diplomacy, statecraft and the business of government and should not be interpreted as co-extensive with state or government business.

(2) That the question as to whether any particular document comes within the expression " affairs of state " must be determined in each case on the relevant facts and circumstances adduced before the Court.

(3) That in deciding whether the production of a document should not be barred by section 123 of the Evidence Ordinance the Court is not precluded by section 162 (2) of the same Ordinance from inspecting the document. Section 162 (2) does not have any application to section 123.

(4) That for the purpose of exercising its functions under section 123, the Court may inspect the document which it is invited to shut out thereunder.

(5) That if a document is an unpublished record relating to any " affair of state " within the meaning of section 123, the Court is bound not to permit its production, but the Head of the Department concerned has a discretionary power to grant permission to produce it. The question whether the public interest will suffer or not does not arise under section 123, because if the document, the production of which is sought, comes within the ambit of the section the Court must shut it out.

(*B*) *Appeal to Supreme Court under section* 82*A of Ceylon* (*Parliamentary Elections*) *Order-in-Council as amended by section* 24 *of the Ceylon Parliamentary Elections* (*Amendment*) *Act, No.* 11 *of* 1959—*Power conferred on Supreme Court by section* 82*B* (3) *to order new trial—Failure on the part of the appellant to call other witnesses on his list except an Inspector of Police, after order upholding claim of privilege—This Inspector called to give evidence of statements made at election meetings at which he was present—Trial Judge disbelieving him partly because he was speaking from memory of what he had heard over two years ago and partly because he showed a bias against respondent—Delay—Should Court order a new trial ?—Evidence Ordinance, Section* 167.

The second question that arose for decision of the Court was whether it should, in exercise of the discretion vested in it under section 82B (3) of the Ceylon (Parliamentary Elections) Order-in-Council as amended by Act, No. 11 of 1959, order that that this election petition be tried anew on the charge of corrupt practice.

The decision of the election Judge not to permit the production of the said reports had the effect of rejecting all relevant evidence of the contents of those reports, which the appellant could otherwise have adduced in proof of the charge of corrupt practice. In view of that order, appellants' counsel at the trial stated that he would not further question one of the constables who made some of the said reports and who had already commenced his examination-in-chief. For the same reason he refrained from calling the other police officers to speak to the contents of the reports prepared by them.

He, however, called Inspector Piyadasa, who gave evidence regarding a speech made by the 1st respondent at a certain meeting notes of which were embodied in one of the reports which was not permitted to be produced by the Election Judge. This Inspector could speak from recollection of what the 1st respondent had said.

The Election Judge disbelieved this witness for the reasons : (*a*) that he was speaking from memory of what he had heard about 2 1/2 years ago ; (*b*) that he had a bias against the 1st respondent. It did not appear from the judgment that, even if the records had been produced and they corroborated this witness, the Judge would have still disbelieved him.

It was contended on behalf of the respondent—

(*a*) that if a new trial was ordered, it would not only provide the appellant with a second opportunity of calling evidence which he had omitted to call at the trial, but also open the door to perjured testimony being adduced at the new trial ;

(*b*) that the long interval of time that had lapsed should weigh against a new trial ;

(*c*) that since the contents of the reports remain undivulged even now, there was no reason to think that they would have such relevance. Consequently ordering a new trial would be to permit the petitioner "to fish for evidence ".

Held : By Basnayake, C.J., and Weerasooriya, S.P.J., (T.S. Fernando, J., *dissentiente*):- That as the trial Judge had formed his conclusions of fact without hearing evidence which was material, it was necessary that there should be a new trial in respect of the charge of making false statements. This was not a case of giving the appellant a second opportunity of calling evidence, for what he asked for was to be given a first opportunity of adducing in evidence the police reports, which was wrongly denied to him at the trial.

Their Lordships also directed that the appellant should not be permitted at the new trial to call those witnesses whom he was not prevented by the aforesaid ruling of the trial Judge and whom he refrained from calling at the trial.

Per BASNAYAKE, C.J.—" Whether the document has been published or not, whether it is an official record or not, and whether it relates to any affairs of State, are questions of fact. The decision of these questions of fact will, of course, be preceded by a decision on the meaning of the expression " affairs of State ", which is a question of interpretation and as such is a matter of law. If the Court requires evidence in order to decide the questions arising for decision, such evidence must be taken in open Court, as our law does not provide for the taking of evidence by affidavit except in certain specified cases (section 179, Civil Procedure Code). "

Per WEERASOORIYA, S.P.J.—" The provision in section 82B giving power to order that an election petition be tried anew is of recent origin, having been introduced by Act No. 11 of 1959. In exercising this power the Court would be guided by the same considerations as in a case where the question is whether a new trial should be ordered by the Court in the exercise of its ordinary appellate jurisdiction.

Section 167 of the Evidence Ordinance provides, *inter alia*, that the improper rejection of evidence shall not be ground of itself for a new trial if it shall appear to the Court that, if the rejected evidence had been received, it ought not to have varied the decision. "

Per T. S. FERNANDO, J.—" We have to decide the question of ordering a retrial without overlooking the circumstance that Piyadasa has been disbelieved. If we are unable to prevent Inspector Piyadasa being called to testify at a new trial—and that I understand is the view of the rest of the Bench—then, I fear, we are giving the petitioner a second chance, after a failure of the first, to see whether a trial judge will believe the evidence of Piyadasa. "

" If the charge of committing a corrupt practice by making false statements is to be tried anew, the witnesses, will be called upon to testify, about four years after the event, to words uttered at meetings in July, 1960. Considering the long interval of time that has elapsed—a delay not attributable in any way to the 1st respondent,—I am unable to say that the discretion vested in this Court by section 82B (3) of the Order-in-Council requires to be exercised in favour of granting a re-trial at this stage. The charge is one in the nature of a criminal charge and it seems to my mind that justice will be met in this case by our making a decision on the question of law which will serve for occasions in the future without exercising in favour of the petitioner the discretion vested in the Court in the matter of retrials. Such an order would, in my opinion, conform to the spirit of the rule embodied in the maxim *nemo debet vexari*, a rule to be encouraged in cases where considerable delay has already occurred. "

Cases referred to : *Ankin* v. *London & North Eastern Rly. Co.*, (1930) 1 K.B. 527 ; 142 L.T. 368 ; 46 T.L.R. 172 ; 99 L.J.K.B. 293.
Duncan v. *Cammell Laird & Co., Ltd.*, (1942) A.C. 624 ; (1942) 1 A.E.R. 587 ; 166 L.T. 366 ; 58 T.L.R. 242.
Spiegelman v. *Hocken and Another*, (1933) 150 L.T. 256; 50 T.L.R. 87; 77 S.J. 82.
Glasgow Corpn. v. *Central Land Board*, (1956) S.L.T. (H.L.) 41.
Broome v. *Broome*, (1955) 2 W.L.R. 402 ; 1955 (1) A.E.R. 201.
Auten v. *Rayner*, (1958) 1 S.L.R. 1300.
Merricks and Another v. *Nott-Bower and Others*, (1964) 2 W.L.R. 702.
Chamarbhaghawalla v. *Parpia*, A.I.R., (1950) Bom. 230.
Bank of England v. *Vagliano Bros.*, (1891) A.C. 107 ; 64 L.T. 353 ; 7 T.L.R. 333 ; 60 L.J.Q.B. 145.
Narendra Nath Sircar v. *Kamalbasini Dasi*, 23 L.R.I.A., (1895-96) 13.
Punjab v. *S. S. Singh*, A.I.R., (1961) S.C. 493.
Nazir Ahmad v. *Emperor*, A.I.R., (1944) Lahore 434.
Governor-General in Council v. *Peer Mohamed Khuda Bux*, A.I.R., (1950) E.P. 228.
Dinbai v. *Dominion of India*, A.I.R., (1951) Bom. 72.
Ilangaratne v. *G. E. de Silva*, (1948) 49 N.L.R. 169 ; XXXVI C.L.W. 97.
Don Philip v. *Illangaratne*, (1949) 51 N.L.R. 561.
Robinson v. *State of S. Australia*, (1931) A.C. 704 ; 145 L.T. 408 ; 47 T.L.R. 454
King v. *Chandrasekera*, (1942) 44 N.L.R. 97 ; XXV C.L.W. 1.
Board of Trustees of Maradana Mosque v. *Minister of Education*, (1963) 65 N.L.R. 376
Don Alexander v. *Leo Fernando*, (1948) 49 N.L.R. 202.

H. W. Jayewardene, Q.C., with *P. N. Wikramanayake* and *N. R. M. Daluwatte*, for the petitioner-appellant.

S. Nadesan, Q.C., with *A. Mahendrarajah, R. R. Nalliah* and *Rajah Bandaranaike*, for the 1st respondent-respondent.

BASNAYAKE, C.J.

This is an appeal, under section 82A of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, as amended by section 24 of the Ceylon Parliamentary Elections (Amendment) Act, No. 11 of 1959, by the petitioner who unsuccessfully presented a petition, under section 79 of the above-mentioned Order-in-Council, in which he claimed—

(*a*) a declaration that the election of the respondent, Tikiri Bandara Illangaratne (hereinafter referred to as the respondent) is void,

(*b*) a declaration that the return of the respondent was undue,

(*c*) a declaration that he was duly elected and ought to have been returned, and

(*d*) a scrutiny.

The two questions that arise for decision on this appeal are—

(*a*) Whether the learned Election Judge was wrong in not permitting the production in evidence of the record of the speeches made at the election meetings of the respondent on 3rd, 6th, 8th and 16th July, 1960, made by police constable Dedigama Ralalage Don Dhanapala (No. 7357), and

(*b*) if so, whether we should order the election petition to be tried anew in regard to the charge of committing the corrupt practice of making or publishing, before or during the election, for the purpose of affecting the return of the petitioner, false statements of fact in relation to the personal character or conduct of the petitioner.

In regard to the first of the above questions, the material facts are shortly as follows :—Police Constable Dhanapala, was an officer attached to the Talatuoya Police Station in 1960. In July of that year he was assigned the duty of attending election meetings and making notes of the speeches

that were made. He was not expected to take down the speeches verbatim. In Dhanapala's own words this is what he was required to do—

> " If any speaker at a meeting spoke disparagingly of the government we were to note it down. If any person was reprimanded or if some speaker said anything against a person we were to make a note of that . . .
>
> . . . I made a note of the names of the speakers and a short note of what they spoke. When the election meeting was over I went back to the station and an entry was made of the fact that we had returned. Thereafter, I prepared a report of what I had taken down. The preparation of such a report had to be done immediately we returned to station. I made my reports in five copies. Those five copies I would hand over to the Officer-in-Charge. As to what he did with those five copies I do not know. I was instructed to make a note of the date and time of the meetings I covered. The place of the meeting was also made a note of by me and also, roughly, the number of persons who were at the meeting. The name of the person who presided over the meetings was also noted down."

The officer-in-charge of the Talatuoya Police Station and the Superintendent of Police, Kandy, were summoned to produce Police Constable Dhanapala's records of the proceedings of the meetings he attended. The officer who represented the Superintendent of Police, Kandy, and who was authorised to take the documents to Court in obedience to the summons claimed that the document was protected under section 123 of the Evidence Ordinance. Learned counsel for the respondent also objected to their production. After hearing counsel for the petitioner and the respondent and the Attorney-General, who appeared as *amicus curiae* and taking into account the affidavit filed by the Inspector-General of Police, the learned Judge upheld the plea of privilege. In his affidavit the Inspector-General of Police said *inter alia*—

> " 3. It has been and is the practice of my Department to gather information and intelligence from various sources in the interests of the preservation of public order and security of the State. One method of collecting such information and intelligence is by requiring Police officers in plain clothes to attend meetings and to forward reports thereon to certain superior officers.
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> 4. The documents referred to in paragraph 2 hereof are reports made by Police officers who in plain clothes attended, and thereafter reported on, certain election meetings held in Hewaheta Electorate in July, 1960.
>
> 5. I have carefully examined the contents of each of the documents referred to in paragraph 2 hereof and I have formed the opinion that it would be injurious to the public interest if these documents are to be produced because they belong to a class of documents the production of which would indicate or tend to indicate the sources of Police information given in confidence, the nature of the information gathered and the persons to whom such information is communicated.
>
> 6. The said documents are unpublished official records relating to affairs of State and belong to a class of documents the practice of keeping which secret is necessary for the proper functioning of the Public Service.
>
> 7. Accordingly, I object to the production of these unpublished official records and have refused permission to the various officers mentioned in paragraph 2 hereof to produce the said documents in Court or to give any evidence derived therefrom."

I shall now turn to section 123 of the Evidence Ordinance. That section reads—

> " No one shall be permitted to produce any unpublished official records relating to any affairs of State, or to give any evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit, subject, however, to the control of the Minister."

The above provision imposes a duty on the Court not to permit any person to produce or to give any evidence derived from " any unpublished official records relating to any affairs of State ", unless the officer at the head of the department concerned gives permission to do so. Except in the case of a document whose very name or nature indicates that it relates to affairs of State the Court would find itself unable to decide whether the document contains matter coming within the ambit of the expression " affairs of State " without examining it. It is submitted that in deciding whether the production of a document should not be permitted on the ground that it is barred by section 123, the Court is precluded by section 162 (2) of the Evidence Ordinance from inspecting the document. The material sub-sections of section 162 read—

> " (1) A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.
>
> " (2) The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility."

The difference in phraseology between section 123 and the above sub-section is noteworthy. The former speaks of " unpublished official records relating to any affairs of State " while the latter speaks of " matters of State ". Quite apart from the fact that in the former the reference is to " any affairs of State " and in the latter to " matters of

State ", the qualification that the documents should be official records and that they should be unpublished are not in sub-section (2). The sub-section is an empowering provision. It empowers the Court to inspect a document or take other evidence in order to determine on its admissibility. It confers no such power when the Court has to determine whether the document is one that may not be produced. Even when the Court has to determine on the admissibility of a document, the power of inspection does not extend to documents which refer to matters of State. The question then is, may the Court inspect a document relating to " affairs of State " for the purpose of exercising the function vested in it by section 123. The wide difference in phraseology between the two sections leads me to the conclusion that section 162 (2) does not have any application to section 123. The two provisions deal with different classes of documents, and different purposes. Section 123 is concerned with preventing the production of unpublished official records relating to any affairs of State ; section 162 (2) is concerned with empowering the Court to inspect a document when it is called upon to decide whether a document is admissible or not. Apart from the fact that section 162 (2) does not forbid the Court from inspecting a document relating even to a matter of State when it is called upon to decide whether the document is one that may be produced, section 162 (2) which is a later section from its very nature and language has no application to section 123. No implied prohibition in section 162 (2) extends to section 123.

For the purpose of exercising its functions under that section the Court is untrammelled by section 162 (2) or any other section and may inspect the document which it is invited to shut out thereunder. It is an established canon of interpretation of statutes that when a power is conferred by statute all powers necessary for the effective exercise of that power are conferred by implication. Section 123 must, therefore, be regarded as conferring those implied powers ; because the Court cannot effectively exercise its far-reaching powers without them. There is nothing in section 123 or any other section which requires the Court to proceed with eyes shut. If the intention of the Legislature was that the Court should act blindfold when determining the questions arising under section 123, it would have expressed it in no uncertain terms and not in the indirect way it is urged it has done. The language of section 162 (2) does not in my view warrant so grave an intrusion on the implied powers of the Court to examine the document before ruling it out, because clear and unmistakable words must exist in an enactment before an intention to subordinate the interests of justice to any other interest is imputed to the Legislature. Such words are not to be found anywhere in the Evidence Ordinance. To impute such an intention to the Legislature would be most unfair.

If a document is an unpublished official record relating to any affairs of State, the Court is bound not to permit its production. But the head of the department concerned has a discretionary power to grant permission to produce such a document. The question whether the public interest will suffer or not does not arise under section 123, because if the document, the production of which is sought, comes within the ambit of the section, the Court must shut it out and is not entitled to let it in on the ground that the public interest will not suffer or on any other ground. Whether the public interest will suffer or not is a consideration which the head of the department concerned may properly take into account in exercising the discretion vested in him. Whether the Court has power to overrule the head of department concerned on the ground that the public interest will not suffer by the disclosure of the contents of a document does not arise under section 123, nor is an affidavit such as the one furnished by the Inspector-General or in any other form called for in deciding whether a document falls within the ambit of section 123. Whether the document has been published or not, whether it is an official record or not, and whether it relates to any affairs of State, are questions of fact. The decision of these questions of fact will, of course, be preceded by a decision on the meaning of the expression " affairs of State ", which is a question of interpretation and as such is a matter of law. If the Court requires evidence in order to decide the questions arising for decision, such evidence must be taken in open Court, as our law does not provide for the taking of evidence by affidavit except in certain specified cases (section 179, Civil Procedure Code). If the head of department concerned withholds his permission, the Court cannot overrule him or query his decision. The question of public interest arises only under section 124 and there, too, the judge of whether the public interest would suffer by the disclosure or communication made to him in official confidence is the public officer concerned and the Court has no power to overrule him or override his opinion.

The Court, as stated above, being under a duty to protect from production in evidence unpublished official records relating to any affairs of State, has to be vigilant when it is sought to produce any document regardless of whether immunity from production is claimed or not. It has power *ex mero motu* not to permit the production of documents which are unpublished official records relating to any affairs of State unless the head of the department concerned gives permission.

Now, as to the expression " affairs of State ", it has not been defined, though often used in relation to the business of the State, such as matters connected with international diplomacy, minutes of public servants to their colleagues or superiors regarding the business of Government, State secrets, and such like documents connected with statecraft. The class is a narrow class and does not vary with the expansion of the Government's field of activity. The expression certainly does not include every record made by a police officer in the course of duties entrusted to him. In seeking to illustrate the meaning of the expression " affairs of State ", Field in his Treatise on the Indian Evidence Act (6th Ed., p. 408) gives the following as illustrative of documents relating to affairs of State—

> " Communications between a Colonial Governor and his Attorney-General on the condition of the colony, or the conduct of its officer, or between such Governor and a military officer under his authority ; the report of a military commission of enquiry made to the Commander-in-Chief and the correspondence between an agent of the Government and a Secretary of State. "

If the State undertakes trade or social welfare, its trading or social welfare activities do not become affairs of State though they are undertaken by the State. Our Evidence Ordinance was enacted in 1895 at a time when the activities of the State were confined to gubernatorial functions. Neither social welfare nor trade came within the ambit of the State's activities. At that time the expression " affairs of State " must have been confined to matters relating to diplomacy and statecraft and the business of government. Words such as these in a statute should be given the meaning they held at the time the statute was passed.

Although documents which are protected by section 123 are referred to as privileged documents, it is not correct to do so. When counsel or a public officer or any other person invites the Court not to permit the production of a document to which section 123 applies, he claims no privilege. His act is an invitation to the Court to obey the imperative prohibition in that section. The question of privilege arises under section 124. There a public officer enjoys the privilege of deciding whether he may disclose or not communications made to him in official confidence. The concepts of English Law have crept into our system and when discussing section 123, both here and in India, Judges and lawyers speak of privilege. Clearly the record of a speech made in public by a candidate at an election meeting is not an unpublished record relating to any affairs of State. The fact that it is taken down by a police officer and forwarded to his superior or recorded in the information book does not alter its character.

Little assistance can be gained by reference to English Law. There the claim of privilege is one based on the common law and the usage of the Courts. The development of the English Law has been largely influenced by public policy and has undergone change over the years. Scrutton, L.J., describes the practice thus—

> " . . . It is the practice of the English Courts to accept the statement of one of His Majesty's Ministers that production of a particular document would be against the public interest, even though the Court may doubt whether any harm would be done by producing it. I have been informed on very high authority that the practice in Scotland is different ; that there the judge looks at the document and orders it to be produced if he does not agree with the Minister's reasons for considering its production to be against the public interest. No harm seems to have resulted from this practice. But that is not the law in England." (*Ankin* v. *London and North Eastern Railway Company*, (1930) 1 K.B. 527, at 533).

This view of the English Law was affirmed in *Duncan* v. *Cammell Laird & Co., Ltd*, (1942) A.C. 624, which still is regarded as the leading case on the subject. Occasionally Judges look at the document as in *Spiegelman* v. *Hocken and another*; *Goldblatt* v. *Same**; reproduced in LI South African Law Journal (1934) where Macnaghten, J., examined the document objected to and admitted it despite the claim of privilege. In Scotland the law is that the Court is entitled to look at the document in order to determine whether its contents should be protected from disclosure [*Glasgow Corporation* v. *Central Land Board*, (1956) S.L.T. (H.L.), p. 41].

A large number of English cases have been cited by both sides, but it is not necessary to refer to them for the reason above stated. In England in the last decade, the tendency has been on the ground of public policy to refuse to permit the production of even documents which disclose no

* See 150 L.T. 256

State secrets. The Crown Proceedings Act, 1947 [(section 28) 10 and 11 Geo. VI, C. 44] while removing the immunity of the Crown from discovery, makes no alteration in the rule as to withholding of documents in the public interest. The views of academic writers in England expressed in their contributions to learned journals indicate a dissatisfaction with the present trend, as the interests of justice are not served by the extension of the protection (*see* Article by J. E. W. Simon in 1955, Cambridge Law Journal, p. 62, on Evidence Excluded by Considerations of State Interest).

The trend of judicial opinion, too, is towards a more liberal approach to the problem in order to ensure that the rule does not result in a denial of justice [see *Broome* v. *Broome*, (1955) W.L.R. 402, and observations of Lord Evershed in *Auten* v. *Rayner*, (1958) 1 S.L.R. 1300, at 1303]. In the most recent pronouncements on the subject in the case of *Merricks and another* v. *Nott-Bower and others* (London Times, 31st January, 1964)†, the Court of Appeal went much further than before in confining the *Cammel Laird* case to the setting in which it had been decided. The certificate in *Merricks* case was in the following terms:—

> " I have personally examined the minutes on the official Metropolitan Police file relating to the transfer of the plaintiffs . . . and have formed the view that on the grounds of public interest the minutes ought not to be produced because they belong to a class of documents which it is necessary in the public interest for the proper functioning of the public service to withhold from production."

and Lord Denning said—

> " . . . The certificate used the words which Lord Simon had used in *Duncan* v. *Cammel Laird & Co.*, (1942) A.C. 624, at p. 642) ; but those words of Lord Simon had not been necessary for the decision in the *Duncan* case, and he would not have wished them to be used as if they were the words of an Act of Parliament.
>
> The practice seemed to have grown up since that decision that all that a Secretary of State had to do was to give a certificate and put in those words as if pronouncing a spell, thereby making all documents tabu. Indeed, the formula had only to be set out, it would appear, and the Court was for ever blindfold. If that were, indeed, the state of affairs it would be deplorable, for there was a natural temptation for people in executive positions to regard the interest of the department as paramount, without realizing that in many cases a greater interest—the interest of justice itself—had to be considered. It was not sufficient to repeat the words of Lord Simon. When a class of document was referred to, His Lordship would like to see that class described in such a way that anyone—Parliament, the public, and the Court and the litigants—could see that it was only right that those documents should be withheld from production. If there was a defect in a certificate, an opportunity might be given to deal with it ; but at the moment His Lordship did not think the Minister's certificate in this case was sufficient to claim protection and he would not on that ground strike out the cause of action in libel."

Lord Justice Salmon in his judgment was even more critical of the existing practice than Lord Denning—

> " *Duncan's* case had been decided in the darkest days of the war—in 1942—before the battle of Alamein. If the documents there concerned had been made public it was obvious that their publication could have been of the greatest assistance to the enemy. It followed, therefore, that when Lord Simon added to the category of documents for which a certificate might be given, ' a class of documents which it is necessary to keep secret for the proper functioning of the public service ' those words were completely *obiter*, and though of very great persuasive authority, they were not binding, particularly on the House of Lords. Clearly documents passing between high officers of State should be kept secret ; but those words *obiter* of Lord Simon had in the last 20 years given rise to a practice that everything, however commonplace, which had ever passed between one civil servant and another behind the departmental screen should be kept secret on the special ground that the possibility of its disclosure in a legal action would impair the freedom and candour of official reports or minutes. In cases of this kind—His Lordship said this with great diffidence—it was a pity that the law of this country could not be brought into line with the law of Scotland where if Crown privilege was being claimed for a document, as, for instance, some communication between one minor civil servant and another, the Court, while accepting the view of the Minister as expressed in his certificate, was entitled to say : ' Well, we must accept the view that this is regarded by the Minister as prejudicial of public interest ; but in a case such as this, the administration of justice is the overriding consideration '. Though it was a power which the Court used sparingly, it was a useful power, particularly having regard to the practice which had grown up of giving a very wide construction to the language of Lord Simon."

In 1956, the Lord Chancellor (*London Times*, 7th June, 1956) made a statement in regard to Crown Privilege (*vide* Appendix " A ")* which disclosed that the Crown was narrowing the privilege hitherto claimed by it ; but in practice there appears to have been no substantial change of policy. In India, where the Law of Evidence is codified as in Ceylon, the provision corresponding to our section 123 is slight different. It reads—

> " No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."

† See (1964) 2 W.L.R. 702

* See page 40

The difference between the two sections is that our section bars both documents to which it applies and oral evidence of their contents, while the Indian section does not make express mention of the production of documents. But the main question for decision remains the same under both sections, viz., "What are unpublished official records relating to any affairs of State ?" The Indian Judges have, in construing the statute, allowed concepts peculiar to English Law to creep in and the result has been that matters that have no place in the statute have been allowed to influence their judgment (see *Charmarbaghwalla* v. *Parpia*, (1950) A.I.R. Bombay, p. 230). In construing our Evidence Ordinance it would not be correct to approach it with preconceived notions of English Law and treat section 123 as a statutory declaration of that system of law. The proper approach to a Code has been stated long ago in the following words [*Bank of England* v. *Vagliano Brothers*, (1891) A.C. 107, cited with approval in *Narendra Nath Sircar* v. *Kamalbasini Dasi*, 23 L.R.I.A., (1896-96), p. 18, at p. 26]—

> ". . . the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used instead of, as before, roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions . . .".

The wise words above cited have been overlooked by many learned Judges both here and elsewhere. When construing section 123 it has been the practice to refer to and cite extensively from English decisions. The danger of such a course is that we may get lost in the contentious matters of the English system which do not exist in our law. It is not necessary to review the Indian decisions. The decision of the Supreme Court of India in State of *Punjab* v. *S. S. Singh* [A.I.R. (1961) S.C. 493, at 502] was cited to us by counsel for the appellant and criticised at length by learned counsel for the respondent. The learned Judges in that case, too, did not seek to define the expression "affairs of State". It was stated there, as I have done here, that whether a document falls within section 123 is a question of fact. The majority judgment stated—

> ". . . The question as to whether any particular document or a class of documents answers the description must be determined in each case on the relevant facts and circumstances adduced before the Court."

The learned Election Judge was, in my opinion, wrong in not permitting the production of the record made by Police Constable Dhanapala of the speeches at the meetings in question.

Before I leave this part of the judgment I should add that, although I have discussed the law with special reference to the evidence of Police Constable Dhanapala and the production of the records of speeches at election meetings attended by him, what I have said above applies equally to the records of speeches made by other police officers whom the petitioner listed as witnesses whom he intended to call.

I accordingly set aside the order of 20th December, 1962, upholding the claim of privilege and refusing under section 123 of the Evidence Ordinance to permit the production of certain documents. While upholding the decisions of the Election Judge as to a recount and in regard to the charge of undue influence, I set aside the order of 8th February, 1963, dismissing the petition of the petitioner. As two out of the three grounds on which the learned Election Judge dismissed the Election Petition have not been canvassed in appeal, I think it is just and proper that the order for costs made by the Election Judge should not be set aside.

I now come to the second question. Inspector Piyadasa, Inspector of Police, Tangalle, who was at the material date in charge of the Talatuoya Police Station, gave evidence of statements made at the election meetings at which he was present. At the meeting held on 3rd July, 1960, which he attended, he stated that the respondent said—

> ". . . the rival candidate was a bus magnate, and he had acquired a portion of land behind the Police Station for a housing scheme, and as the buses were taken over by the Government, and as the land was acquired by him for a housing scheme, he has come forward to fight this Election. He further said that as Chairman of the Village Committee of Talatuoya the other candidate had misappropriated funds from the Galaha Theatre and he carried on."

Piyadasa was disbelieved by the learned Election Judge. Dhanapala also attended that meeting and recorded the speeches. It does not appear

from the judgment that even if the records made by Dhanapala had been produced and they corroborated Piyadasa, the learned Judge would, notwithstanding the corroboration, have disbelieved him. He states in the course of his judgment—

> ". . . I am not satisfied with the evidence of Inspector Piyadasa to feel safe to hold the respondent, Mr. Ilangaratne, guilty of a corrupt practice of making a false statement referred to. Inspector Piyadasa is speaking from memory of an incident that took place more than 2 1/2 years ago. Moreover, there is evidence to show that rightly or wrongly, he has a bias against Mr. Ilangaratne because of certain allegations made by Mr. Ilangaratne during the elections that certain Police Officers were working against him at that time. Even in the course of giving evidence before me, I could not help feeling and sensing that Mr. Piyadasa suffered from a feeling of bias against Mr. Ilangaratne, which renders, his evidence suspect in my eyes, As a finding of fact therefore, I also hold that I am not satisfied that the alleged statement has been proved to have been made."

It would appear from the words quoted above that the learned Judge's disinclination to act on Piyadasa's evidence was partly influenced by the fact that Piyadasa was speaking from memory of what he had heard about 2 1/2 years ago, and partly by the fact that he had a bias against the respondent. It is not possible to state to what extent Dhanapala's record of the speech would have affected the judgment of the learned Judge. If it corroborated Piyadasa, it is not likely that he would have been entirely uninfluenced by it. The question then is what order are we to make. Before 1959, when section 82B was amended, this Court had power upon an appeal only to affirm or reverse the determination of the Election Judge. In 1959, the section was amended to read—

> " 82B. (1) The Supreme Court may, upon any appeal preferred under section 82A, affirm, vary or reverse determination or decision of the election judge to which the appeal relates.
>
> (2) Where the Supreme Court reverses on appeal the determination of an election judge under section 81, that Court shall decide whether the Member whose return or election was complained of in the election petition, or any other and what person, was duly returned or elected, or whether the election was void, and a certificate of such decision shall be issued by that Court.
>
> (3) The Supreme Court may, in the case of any appeal under section 82A, order that the election petition to which the appeal relates shall be tried anew in its entirely or in regard to any matter specified by that Court and give such directions in relation thereto as that Court may think fit.
>
> (4) The Supreme Court may make any order which it may deem just as to the costs of the appeal and as to the costs of and incidental to the presentation of the election petition and of the proceedings consequent thereon, and may by such order reverse or vary any order as to costs made by the Election Judge ; and the provisions of the Third Schedule to the award, taxation and recovery of costs shall *mutatis mutandis* apply in relation to the award of such costs by the Supreme Court and the taxation and recovery thereof.
>
> (5) The decision of the Supreme Court on any appeal shall be final and conclusive."

Section 82B in its present form empowers this Court to take one of two courses in a case when it reverses the decision of the Election Judge. It may decide whether the member whose return or election was complained of in the election petition, or any other and what person, was duly returned or elected, or whether the election was void, or order that the election petition shall be tried anew. In the instant case the course provided in sub-section (2) cannot properly be taken and we are left with that provided in sub-section (3).

Where the trial Judge has formed his conclusions of fact without hearing evidence which is material, it is necessary that there should be a trial at which the Judge should hear all the admissible evidence that the petitioner was seeking to produce. I, therefore, in terms of sub-section (3) order that the election petition should be tried anew. Now sub-section (3) empowers this Court to order a new trial of an election petition in its entirety or in regard to any matter specified by this Court. The petitioner in his election petition asked for a recount and also that the return of the 1st respondent be declared null and void by reason of the corrupt practices of undue influence and of making false statements of fact in relation to the personal character of the petitioner. Although the learned Election Judge held against the petitioner on all the grounds which were urged at the trial, learned counsel for the appellant did not seek to canvass the decisions as to the recount and on the charge of undue influence. He confined the argument at the hearing of the appeal to the charge of making false statements. The new trial should, therefore, be only in respect of the charge of making false statements. Subsection (3) also empowers this Court to give such directions in relation to the new trial as the Court may think fit.

In the circumstances of this case it seems to me reasonable that directions should be given in regard to the new trial in view of the fact that Inspector Piyadasa was the only witness called to give oral evidence of false statements affecting the

character of the petitioner. It is right and proper, therefore, that the petitioner should not be permitted at the stage of the new trial to call those witnesses whom he was not precluded by the ruling of 20th December, 1962, from calling and whom he refrained from calling at the first trial. He should be permitted at the new trial to call Inspector Piyadasa and all other witnesses called at the first trial to establish the charge of making false statements and all the witnesses he was precluded from calling by the ruling of the Election Judge on 20th December, 1962. He should also be permitted to call any other witness who according to the law of Evidence should be called in order to make admissible the evidence of the witnesses whose evidence will be led in consequence of our decision in appeal. I direct that the petitioner should also be permitted to—

(*a*) lead evidence to prove the falsity of any statement in regard to the making of which evidence is adduced, or to prove that any person referred to in the particulars as having made a false statement, was an agent of the 1st respondent, provided the name of such witness appears in a list of witnesses already filed by him, and

(*b*) call any witnesses the petitioner may have to call in rebuttal where he is entitled in law to call evidence in rebuttal.

The Election Judge is also directed to exercise all powers that are ancillary or incidental to the carrying out of the above orders and directions.

I order the 1st respondent to pay to the petitioner the costs of appeal.

WEERASOORIYA, S.P.J.

This is an appeal filed under the provisions of the Ceylon (Parliamentary Elections) Order-in-Council, 1946.

The appellant and the 1st respondent were rival candidates at the general election held on the 20th July, 1960, for the return of members to the House of Representatives. The contest between the appellant and the 1st respondent was in regard to the return of a member for Electoral District, No. 49, Hewaheta. The 1st respondent was declared duly elected by a majority of 126 votes. The appellant then filed an election petition challenging the return of the 1st respondent on the grounds of a miscount of votes, undue influence and corrupt practices, and praying, *inter alia*, for a declaration that the return of the 1st respondent was undue and that the appellant was duly elected and ought to have been returned. After trial the petition was held by the Election Judge to have failed on all grounds and that the 1st respondent had been duly elected and returned. Hence this appeal.

Under section 82A of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, an appeal lies to the Supreme Court on a question of law against the determination of an Election Judge that a member of the House of Representatives, whose return or election is complained of, was duly returned or elected. In the petition of appeal filed by the appellant he sought to have the findings of the Election Judge on the charges of undue influence as well as corrupt practices set aside on various grounds of law. But at the hearing of the appeal, Mr. Jayewardene, who appeared for the appellant, did not canvass the Election Judge's findings on the charge of undue influence and he confined his submissions to the findings on the charges of corrupt practices.

The corrupt practices alleged against the 1st respondent in the election petition were that he, by himself or his agents, and for the purpose of affecting the return of the appellant, did make false statements of fact in relation to the character or conduct of the latter. There are listed in the statements of particulars furnished by the appellant, seven election meetings held on the 3rd, 6th, 8th, 12th and 16th July, 1960, in Electoral District, No. 49 at which the statements in question are said to have been made.

It would appear that certain police officers were present at those meetings, and in terms of general instructions previously issued to them, they made notes of what was said by the various speakers on specified points, one of them being anything spoken by a candidate, or on his behalf, against the rival candidate or candidates. Not more than one officer made notes at any single meeting. After the meeting was over the procedure was for him to go back to the Police Station and prepare a report (which he was expected to do within twenty-four hours) of what he had noted. Five copies of the report were prepared and handed over to the officer-in-charge of the Police Station, who had to forward them to the Superintendent of Police of the district.

The seven election meetings referred to were held at various places within the limits of the Talatuoya Police Station, the officer-in-charge

of which was Inspector Piyadasa (then a Sub-Inspector). The officers who were present at these meetings were constables Dhanapala, Rajapakse and Ranaweera of the same Police Station. The petitioner had taken out summons on the officer-in-charge of the Talatuoya Police Station and on the Superintendent of Police, Kandy, to produce or cause to be produced at the trial the reports of constables Dhanapala, Rajapakse and Ranaweera containing notes of the speeches made at the meetings attended by them. But in respect of these reports a claim of privilege from production was taken under section 123 of the Evidence Ordinance by the officer who brought the reports to Court in obedience to the summons. This claim, which was also supported by an affidavit from the Inspector-General of Police, was upheld by the Election Judge who refused permission for the production of the reports. The first question for decision in this appeal is whether the Election Judge was right in giving this ruling.

Section 123 of the Evidence Ordinance reads as follows :—

> " No one shall be permitted to produce any unpublished official records relating to any affairs of State, or to give any evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit, subject, however, to the control of the Minister."

It was common ground at the hearing of the appeal, as it was at the trial too, that where a question arises whether any unpublished official records are records relating to " any affairs of State " within the meaning of that expression in section 123, the decision of it rests with the Court. The same expression occurs in the corresponding section of the Indian Evidence Act (also section 123) and has been the subject of conflicting decisions by the Indian Courts. The Election Judge held that the expression has to be given a wide interpretation, and that " any matter which appertains to the exercise of governmental or administrative functions is an affair of State ". In so construing the expression the Election Judge purported to follow a decision of the Lahore High Court in *Nazir Ahmad* v. *Emperor*, A.I.R. (1944) Lahore 434, but it has to be stated that the view expressed there was disapproved by a Full Bench of the High Court of East Punjab in *Governor-General in Council* v. *Peer Mohamed Khuda Bux*, A.I.R. (1950) E.P. 228 ; and that, even before the latter decision came to be given, the view was by no means one which was consistently adopted by the Lahore High Court in its earlier cases. A more restricted interpretation has been given to the expression by the Bombay High Court—see *Dinbai* v. *Dominion of India*, A.I.R. (1951) Bombay 72. But as far as the Indian Courts are concerned, the question has since been authoritatively settled by the Supreme Court of India in the recent case of *The State of Punjab* v. *S. S. Singh*, A.I.R. (1961) S.C. 493, which was not cited at the argument before the Election Judge. Four of the five Judges who heard that case rejected the interpretation of the expression " affairs of State " as co-extensive with " State or Government business ", which Mr. Nadesan pressed on us to adopt, and they held that it applied to a smaller category of documents within that class. With this conclusion I would respectfully agree. They refrained, however, from attempting a definition of the expression " affairs of State " and said that the question whether any particular document or class of documents comes within it must be determined in each case " on the relevant facts and circumstances adduced before the Court ".

Mr. Nadesan submitted as an alternative argument that if we do not accept the interpretation of the expression for which he contended, the documents in question, being departmental reports of a confidential nature submitted by the police officers concerned, would be documents relating to affairs of State in the narrow sense in which the expression was construed in *The State of Punjab* v. *S. S. Singh* (*supra*). In considering this argument I may refer to the evidence given by Constable Dhanapala when he was called as a witness for the appellant shortly before the objection to the production of the police reports was taken. He said that when he attended a meeting he made a short note of what was spoken by each of the speakers, and after the meeting was over he went back to the Police Station and prepared a report of what he had taken down. Neither in his evidence nor in the affidavit of the Inspector-General of Police is there anything to indicate that in addition to the notes of the speeches and the names of the speakers the report contained *comments or expressions of opinion by him or information relating to any other matter*. It must be remembered that the speeches reported were intended for the public ear, which was in all probability reached through one or more microphones set at the loudest pitch. Even if there were no microphones, there is little doubt that the speeches were delivered quite openly

and their contents were matters of common knowledge among those present. The question arises for serious consideration whether such reports can be described as " *unpublished* official records ". The position seems to be no different from a case where a police officer is instructed to proceed to a place where there is a public monument and forward a report of an inscription on it. It would be absurd to contend that the report sent in compliance with these instructions is an *unpublished* official record. In my opinion, the words " unpublished official records " mean any matter or matters placed for an official purpose which have not been previously published. On this reasoning, the reports sought to be produced by the appellant cannot be said to come within the class of documents mentioned in section 123 of the Evidence Ordinance irrespective of whether they relate to matters of State or not.

Even apart from the question whether these reports are " *unpublished* official records ", I do not see how they can be described as records " relating to affairs of State ". In more than one reported case the notes taken by police officers have been admitted in evidence as a proper method of proving speeches made at election meetings—see *Illangaratne* v. *George de Silva*, 49 N.L.R. 169, at 173, and *Don Philip* v. *Illangaratne*, 51 N.L.R. 561, at 562. In each of these cases one of the parties was no other than the 1st respondent himself. The fact that the notes are contained in a confidential report submitted by the police officer concerned, does not, in my opinion, convert the notes or the report into a record relating to affairs of State. I am far from saying, however, that in no circumstances can a police report be regarded as a document relating to affairs of State. Much would necessarily depend on the subject-matter of the report and on the comments and expressions of opinion, etc., which it may contain. From what I have already stated it will be seen that these considerations do not arise in regard to the reports with which we are concerned in the present case. I hold, therefore, that the Election Judge was wrong in sustaining the claim of privilege taken in respect of these reports under section 123 of the Evidence Ordinance.

In view of this finding, the only other question which directly arises for decision is what our order should be regarding the relief claimed under head (3) of the prayer in the petition of appeal, which is as follows :—

" 3. Or in the alternative to make order that the Election Petition be tried anew in regard to the allegation of making or publishing the said false statements of fact, proof of which was excluded by the learned Election Judge, in upholding the claim of privilege."

Section 82B (3) of the Ceylon (Parliamentary Elections) Order-in-Council empowers this Court, on an appeal under section 82A, to order that an election petition to which the appeal relates be tried anew in its entirety or in regard to any specified matter and to give such directions in relation thereto as the Court may think fit. The provision in section 82B giving power to order that an election petition be tried anew is of recent origin, having been introduced by Act No. 11 of 1959. In exercising this power the Court would be guided by the same considerations as in a case where the question is whether a new trial should be ordered by the Court in the exercise of its ordinary appellate jurisdiction.

Section 167 of the Evidence Ordinance provides, *inter alia*, that the improper rejection of evidence shall not be ground of itself for a new trial if it shall appear to the Court that if the rejected evidence had been received it ought not to have varied the decision. The decision of the Election Judge not to permit the production of the reports prepared by Constable Dhanapala and the other police officers containing their notes of the speeches made at the various election meetings, had the effect of rejecting all relevant evidence of the contents of those reports which the appellant could otherwise have adduced in proof of the charge of corrupt practice brought against the 1st respondent in respect of the said speeches. In view of that order, appellant's counsel at the trial stated that Constable Dhanapala, whose examination-in-chief as a witness for the appellant had already commenced when the order was made, would not be further questioned by him. It was, no doubt, for the same reason that counsel refrained from calling the other police officers to speak to the contents of the reports prepared by them. But he called Inspector Piyadasa, who gave evidence regarding the speech made by the 1st respondent at the meeting held at Angilipitiya (also referred to as Omugalpitiya in the particulars furnished by the appellant relating to the charge of corrupt practice by making false statements) on the 3rd July, 1960. Constable Dhanapala, who was also present at the meeting, took notes of the 1st respondent's speech, and his report containing the notes was one of the reports the production of

which was not permitted by the Election Judge. Inspector Piyadasa could only speak from recollection of what the 1st respondent said, and he purported to do so independently of the notes made by Constable Dhanapala.

According to Inspector Piyadasa, one of the statements made by the 1st respondent regarding the appellant was that as Chairman of the Talatuoya Village Committee he " had misappropriated funds from the Galaha Theatre and he carried on", and that as he (the 1st respondent) had taken action in the matter the appellant was angry with him. The Talatuoya Village Committee is also known as the Gandahaya Village Committee. The documents P2 and P3 show that on the 15th December, 1958, the appellant had been charged by the Police in case No. 10782 of the Magistrate's Court of Kandy with having, between the 15th January and the 24th August, 1958, committed criminal breach of trust in respect of a sum of Rs. 2,914.20 being entertainment tax paid by the Galaha Jothi Cinema and received by the appellant as Chairman of the Gandahaya Village Committee, and that he was acquitted of that charge on the 15th September, 1959. The document P4 shows that investigation leading to the prosecution of the appellant came to be made as a result of an official letter sent to the Assistant Commissioner of Local Government, Kandy, on the 19th August, 1959, by the 1st respondent himself.

The Election Judge held that it was not safe to act on the evidence of Inspector Piyadasa, speaking as the latter did from memory to an incident which had taken place over two-and-a-half years previously, and that, moreover, Inspector Piyadasa appeared to have a feeling of bias against the 1st respondent. In so far as these reasons influenced the finding of the Election Judge that the charge relating to the making of false statements at the Angilipitiya meeting had not been established, I am unable to say that had Constable Dhanapala's report of the speech made by the 1st respondent at that meeting been permitted to be produced and its contents received in evidence, it ought not to have varied the finding. If the report was accepted as a contemporaneous note of what the 1st respondent stated at the meeting, and the note was found to support the evidence of Inspector Piyadasa, the Judge may have believed him notwithstanding that he appeared to be a biassed witness. On the other hand, had the production of the report made no difference to the Judge's disbelief of Inspector Piyadasa it was yet possible for the appellant, without recourse to the Inspector's evidence, and on the strength of the report itself, coupled with such evidence as the officer making the report would have given with reference to its contents, to have established that the statements alleged to have been made at the Angilipitiya meeting were, in fact, made. The position would be the same in regard to the reports of the speeches made at the other meetings, provided, of course, they supported the allegations made, and were accepted by the Court as representing correctly what was said at those meetings.

In regard to the statement that the appellant " had misappropriated funds from the Galaha Theatre and he carried on ", the Election Judge observed that there was not even a bare denial of the truth of it by the appellant and that in the absence of such a denial the appellant had failed to make out a *prima facie* case in regard to a necessary ingredient of the charge, viz., that the statement (assuming it was made) was, in fact, false. Mr. Nadesan rightly attached special importance to this finding, for it must be conceded that, if the finding is valid, there is revealed an inherent defect in the presentation of this part of the appellant's case which would not have been cured even if the production of Constable Dhanapala's report of what was said at Angilipitiya had been permitted by the Election Judge and the contents of it received in evidence.

Apparently the Election Judge was prepared to regard the acquittal of the appellant in M.C. Kandy, Case No. 10782, as *prima facie* establishing the falsity of the statement, provided the statement could be said to refer to the specific misappropriation which was the subject of the charge in that case. But the Judge observed that there was " no evidence at all to show that there may not have been other misappropriations of other sums from other theatres at Galaha or even from the same place of entertainment ". As for the possibility that the statement may have referred to misappropriation of funds from a different theatre in Galaha, or (if it did refer to the same theatre) to a different sum of money, from that mentioned in the charge preferred against the appellant in M.C. Kandy, Case No. 10782, it would appear from the document P4 that the 1st respondent, who was then Minister of Labour, Housing and Social Services, wanted investigation to be made into the failure of the Gandahaya South Village Committee to show accounts regarding entertainment tax collected " from the Picture Palaces at Galaha ". In view of this ministerial decree, which embraced all the cinemas at Galaha,

it is unlikely that any departmental investigation which followed was merely confined to ascertaining whether entertainment tax collected from only the Jothi Cinema had been duly accounted for ; and when the Police eventually decided to proceed against the appellant on the specific charge set out in their report to Court in M.C. Kandy, Case No. 10782, it may be assumed, I think, that there was no evidence of " other misappropriations of other sums from other theatres at Galaha or even from the same place of entertainment ".

In holding that the appellant failed to make out a *prima facie* case of falsity of the statement that the appellant " had misappropriated funds from the Galaha Theatre and he carried on ", the Election Judge relied on the case of *Don Philip et al.* v. *Illangaratne* (*supra*) where Nagalingam, J., considered the nature of the burden of proof which lies on the petitioner and the respondent at an election petition inquiry in regard to an allegation that the respondent or his agents made false statements of fact relating to the character or conduct of the petitioner. Nagalingam, J., said that the falsity of the statement must be *prima facie* established by the petitioner, but, once that is done, the burden is on the respondent, if he asserts that the statement is true, to establish beyond reasonable doubt the truth of it. The question of the burden of proof was not raised by Mr. Jayewardene or Mr. Nadesan at the hearing of this appeal. But in so far as it may be regarded as necessary for the appellant, in accordance with the view expressed by Nagalingam, J., to make out a *prima facie* case of falsity of the statement that he misappropriated funds from the Galaha Theatre, I would, for the reasons indicated by me, record my respectful dissent from the finding of the Election Judge that the appellant had failed to do so.

It seems to me, therefore, that the limitation imposed by section 167 of the Evidence Ordinance on the power of the Court to order a new trial does not apply to the present case. It then becomes a matter within our discretion as to whether under the powers conferred by section 82B (3) of the Ceylon (Parliamentary Elections) Order-in-Council a new trial should be ordered or not on the charge of corrupt practice by making false statements of fact relating to the appellant's character or conduct. Mr. Nadesan submitted that, even so, a new trial should not be ordered. He drew attention to the particulars furnished by the appellant as late as on the 26th November, 1962, which purported to give the gist of each of the false statements alleged to have been made by the 1st respondent or his agents, thereby indicating that the appellant was in a position to call in proof of those statements witnesses other than the police officers who made notes of what was said at the meetings, whereas when the trial commenced it became clear that the appellant had no intention of relying on those other witnesses. Mr. Nadesan submitted that if a new trial is ordered it would not only provide the appellant with a second opportunity of calling evidence which he had omitted to call at the trial, but also open the door to perjured testimoney being adduced at the new trial. Mr. Nadesan also relied on the lapse of time which has occurred since the election was held, over three years ago.

The lapse of time—even though neither party is in any way to be blamed for it—is, no doubt, a matter which is relevant to the question whether a new trial should be ordered. But, it seems to me, that in the present case it is outweighed by other considerations. The reason for the decision not to call any witnesses (with the possible exception of Inspector Piyadasa) to speak to the alleged false statements, other than the police officers who made notes of those statements, would appear from the following passage in the record of the opening speech of appellant's counsel :

> " In regard to the statements concerned it is not possible today, so many years after the elections, for people to recollect the actual words used, but it is fortunate that the police had covered certain meetings and the police reports are available. Those reports were made by the police in the course of their duties and those reports will be relied upon."

It seems to me that the decision of learned counsel was not only a proper one, but was also fully justified, especially when considered in the light of the subsequent failure of Inspector Piyadasa to convince the Election Judge that the evidence which he gave from recollection regarding the speech made by the 1st respondent at the Angilipitiya meeting could be acted upon.

It is not a case, therefore, of the appellant being given a *second* opportunity of calling evidence which he omitted to call at the trial. What he asks for, and I think he is entitled to, is to be given a *first* opportunity which, on our finding, was wrongly denied to him at the trial, of adducing in evidence the police reports, should they be relevant to the question whether the statements in question

were made or not. Mr. Nadesan submitted that since the contents of the reports remain undivulged even now, there is no reason to think that they will have such relevance. No submission was, however, addressed to us by Mr. Nadesan that any doubts regarding the relevance of the reports be settled by our inspecting them even at this stage ; and we have decided against an inspection *ex mero motu*. I do not think that it is right to assume that the reports will not support the appellant's case on the issue whether the false statements in question were made or not.

I would set aside the judgment appealed from in so far as it relates to the charge of corrupt practice by making false statements of fact relating to the character or conduct of the appellant, and also the order of the Election Judge upholding the claim of privilege in respect of the police reports. I would send back the case for a new trial on that charge, on the basis of the particulars in the appellant's statement dated the 26th November, 1962, save and except the particulars in paragraph 5 thereof. I would also direct that at the new trial the appellant should not be permitted to call any witness to prove the *making* of the alleged false statements other than Inspector Piyadasa and Police Constables Dhanapala, Rajapakse and Ranaweera. This direction will not apply—

(*a*) to any witness who is called to prove the *falsity* of any statement in regard to the making of which evidence is adduced, or to prove that any person referred to in the particulars as having made a false statement, was an agent of the 1st respondent, provided the name of such witness appears in a list of witnesses already filed by the appellant ; or

(*b*) to any witness called by the appellant in rebuttal, in any case where he is entitled in law to call evidence in rebuttal.

I see no reason to interfere with the order for costs of trial already made by the Election Judge, but the appellant will be entitled to his taxed costs of appeal from the 1st respondent.

T. S. Fernando, J.

At the general election held on July 20, 1960, the 1st respondent was elected as member in the House of Representatives for the electoral district of Hewaheta. The petitioner who was the other candidate for election as member for the same electoral district presented on August 18, 1960, a petition praying, *inter alia*, (i) that a recount of the votes be ordered before trial, and (ii) that a declaration be made by the Court that the return of the 1st respondent as member at the said election was null and void on the ground of : (*a*) the commission of the offence of undue influence as defined in section 56 of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, and (*b*) the commission of a corrupt practice within the meaning of section 58 of the same Order-in-Council in that the 1st respondent by himself or his agents published before or during the said election false statements of fact in relation to the personal character of the petitioner for the purpose of affecting the return of the petitioner at the said election.

An order for a recount was made by the election judge and a recount in accordance with directions given therefor by the said judge took place in due course, but it is sufficient here to record that the recount also showed that the 1st respondent had a majority of the lawful votes cast at the said election. In regard to the prayer for the avoidance of the election on the ground of the commission of the offence of undue influence, although evidence was led on behalf of the petitioner in support thereof, the election judge held that ground not established to his satisfaction. The election judge held the remaining ground of the commission of a corrupt practice also not proved and dismissed the petition ordering the petitioner to pay to the 1st respondent one-third of his incurred costs not to exceed a sum of Rs. 16,000/-.

The petition of appeal does not seek to reagitate the question of the correctness of the count of the votes, and is confined to canvassing the legality of the findings of the trial judge in respect of the two corrupt practices above referred to. At the hearing of the appeal, the petitioner's counsel did not attempt to advance any argument in respect of the allegation of undue influence and restricted himself to arguing that the dismissal of the charge of corrupt practice of making false statements in relation to the petitioner's personal character is vitiated by an order made by the trial judge upholding an objection taken to the production of certain documents in the custody of a public officer.

It is important to bear in mind that an appeal to the Supreme Court against a determination of an election judge lies only on a question of law. Section 82A of the Order-in-Council as amended by Act, No. 11 of 1959, now reads—

> (1) An appeal to the Supreme Court shall lie on any question of law, but not otherwise, against—
>
> (*a*) the determination of an election judge under section 81, or
>
> (*b*) any other decision of an election judge which has the effect of finally disposing of an election petition.

The main question we are called upon to consider on this appeal and on which we listened to exhaustive argument was the correctness of the order of the trial judge upholding the objection above referred to. It is necessary now to state the circumstances in which that order came to be made.

On an application for particulars of the charge of making false statements in relation to the personal character of the petitioner, the petitioner furnished to the 1st respondent on November 9, 1962, a statement showing certain particulars of the names and addresses of persons who are said to have made the false statements and the dates and times they were made. On an application made for further particulars, and consequent to an order of the trial judge thereon, the petitioner furnished certain fuller particulars on November 26, 1962, indicating the gist of the statements alleged to have been made by the 1st respondent at five named places and by four other named persons who are alleged to have acted as agents of the 1st respondent or with his knowledge or consent.

The petitioner applied for and obtained summonses on the Deputy Inspector-General of Police, the Superintendent of Police, Kandy, and the Officer-in-Charge of the Talatuoya police station to produce or cause to be produced four reports made by Police Constable No. 7537 D. A. Danapala, two reports made by Police Constable No. 6813 D. A. Rajapakse and one report made by Police Constable No. 1105 S. K. Ranaweera, to their superior officers.

On December 14, 1962, when counsel for the petitioner reached the stage of leading evidence in respect of the charge of making false statements, he called into the witness box constable Danapala who testified that he was one of the officers detailed to cover election meetings and that he had been instructed on the points to be noted.

To use his own words, " we were also to make notes of whatever that was being spoken—not everything that was said, but we were directed to make a note of particular points, the important facts. If any speaker spoke disparagingly of the government we were to note it down. If any person was reprimanded or if some speaker said anything against a person we were to make a note of that . . . There were various speakers at such election meetings. I made a note of the names of the speakers and a short note of what they spoke. When the election meeting was over I went back to the station and an entry was made of the fact that we had returned. Thereafter, I prepared a report of what I had taken down. I sent my report in Sinhalese. I cannot remember the places of the meetings I went. What I have heard at the meetings will be in my report ". There is no record of his having said at the trial that he was unable, on the day he was called into the witness-box, to recall what was said by the speakers at the meetings held in July, 1960, but the evidence I have reproduced above appears to have been understood at the trial as meaning that, independently of the records he made in the report, he was unable to recall the statements from memory. The arguments addressed to us at the hearing of the appeal also proceeded on the basis of the same understanding.

In the transcript of the proceedings in Court there is a record—reproduced below—of what transpired when constable Danapala gave the evidence I have already quoted :—

> " At this stage Mr. Wickramanayake (counsel for petitioner) states that he has summoned both the Officer-in-Charge of Talatuoya Police Station and the Superintendent of Police, Kandy, to produce or cause to be produced, the reports of the meetings covered by this witness on the 3rd, 6th, 8th and 16th July, 1960. He has applied for certified copies but has been refused.
>
> Inspector Perera who appears on behalf of the Superintendent of Police, Kandy, who was summoned to produce the records of certain reports made by P. C. Danapala is present and states that he has summons but has been instructed to plead privilege under section 123 of the Evidence Ordinance. In view of this plea Mr. Nadesan (counsel for the 1st respondent) states that he is objecting to the production of these statements."

Argument of counsel ensued, and in the middle of that argument an affidavit was presented to the Court (presumably by Inspector Perera

referred to above). The affidavit was one made by the Inspector-General of Police who stated therein that he is the head of the police department. It was further stated in the affidavit that the reports his officers have been summoned to produce have been carefully examined by him and that he has formed the opinion that it would be injurious to the public interest if these documents are to be produced because they belong to a class of documents the production of which would indicate or tend to indicate the sources of police information given in confidence, the nature of the information gathered and the persons to whom such information is communicated. It is stated in paragraph 6 of the affidavit that " the said documents are unpublished official records relating to affairs of State and belong to a class of documents the practice of keeping which secret is necessary for the proper functioning of the public service " ; and in paragraph 7 that " accordingly, I object to the production of these unpublished official records and have refused permission to the various officers mentioned in paragraph 2 hereof to produce the said documents in Court or give evidence derived therefrom ".

After long argument had in the election Court. the learned trial Judge made order on December 20, 1962, refusing permission to produce the documents in question.

When the order was delivered, Mr. Wikramanayake stated to the judge that, in view of the order, he desired the witness, Danapala, to stand down. He added that if the need arises he would apply for a recalling of the witness. Mr. Nadesan thereupon stated that he wished to cross-examine the witness and was permitted to do so. Certain other witnesses, described as formal, were then called. Witnesses whose evidence would have been relevant on the charge of undue influence were next called and, thereafter, Mr. Wikramanayake called in support of the case for the petitioner witness G. S. Piyadasa who was in July, 1960, the officer-in-charge of Talatuoya Police Station which is said to be the station serving the area where the villages in which all the election meetings we are concerned with in this case are situated. This witness purported to speak of certain statements made by the 1st respondent at an election meeting held on July 3, 1960, at Ankelipitiya at which he said he was himself present. When the learned judge made his determination at the conclusion of the trial holding, *inter alia*, that the charge of committing a corrupt practice by making a false statement to character was not proved, he stated he was, " not satisfied with the evidence of Inspector Piyadasa to feel safe to hold the 1st respondent guilty of a corrupt practice of making a false statement referred to. Inspector Piyadasa is speaking from memory of an incident that took place more than 2 1/2 years ago. Moreover, there is evidence to show that, rightly or wrongly, he has a bias against Mr. Illangaratne because of certain allegations made by Mr. Illangaratne during the elections that certain police officers were working against him at that time. Even in the course of giving evidence before me, I could not help feeling and sensing that Mr. Piyadasa suffered from a feeling of bias against Mr. Illangaratne which renders his evidence suspect in my eyes. As a finding of fact, therefore, I also hold that I am not satisfied that the alleged statement has been proved to have been made ". Having reached this finding, the learned judge, as I have stated already, dismissed also the charge of committing a corrupt practice of making false statements in relation to the personal character of the petitioner.

The main question arising on this appeal, viz., the correctness of the order upholding the objection to the production in evidence of the report made by Police Constable Danapala to his superior officer involves the interpretation of section 123 of the Evidence Ordinance. That section is in the following terms :—

> " 123. No one shall be permitted to produce any unpublished official records relating to any affairs of State, or to give evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit, subject, however, to the control of the Minister."
>
> (The expression " Minister " appearing in section 123 was a substitution for the expression " Governor " effected by a Proclamation, published in *Gazette Extraordinary*, No. 9773, dated 24th September, 1947, issued under section 88 of the Ceylon (Constitution) Order-in-Council, 1946).

As the learned trial judge preferred to accept the wide interpretation of the expression " affairs of State " appearing in the corresponding section of the Indian Evidence Act of 1872 to be found in certain judgments of the Lahore High Court rather than a restricted interpretation thereof given in decisions of other High Courts of India, notably of Bombay, and as I myself propose to accept an interpretation of that expression set out in a recent decision of the Supreme Court of

India, it will be useful if the corresponding section of the Indian Evidence Act is also reproduced below :—

> " 123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."

The judgments of the Lahore High Court which the learned trial judge had in mind are not specified in his order, but were probably those referred to by counsel before him in the course of their arguments. The trial judge construed the words " relating to any affairs of State " in section 123 of the Evidence Ordinance as meaning any matter appertaining to an administrative act or governmental function. He went on to say that, as the head of the department has claimed that the document belongs to a class of documents which it is necessary in the interest of public security to keep secret, the claim of privilege will be upheld. The Lahore case which calls for most notice is that of *Nazir Ahmad* v. *Emperor*, (1944) A.I.R. (Lahore) 434, in which Abdur Rahman, J. stated—(see page 440) :—

> " Thus the decision of the question whether a privilege is to be claimed solely rests with the authority which is competent to claim such privilege and the Court can in those circumstances merely give effect to that decision by adding its own command to it but without verifying the correctness of the allegations or the grounds on which the privilege was claimed."

He did not apparently agree with the view expressed by Bhagwati, J., in *Chamarbaghwalla* v. *Parpia*, (1950) A.I.R. (Bombay) 230, also referred to by him where that learned judge stated —(see p. 232)—

> " Every communication which proceeds from one officer of the State to another officer of the State is not necessarily relating to the affairs of State. If such an argument was pushed to its logical extent, it would cover even orders for transfer of officers of Government Departments and the most unimportant matters of administrative detail which may be addressed by one officer of the State to another. That could not be within the intendment of the Act at all."

In preferring to accept what he calls the view of the Lahore High Court to that described by him as the opposite view, taken particularly by the Bombay High Court in *Dinbai* v. *Dominion of India*, (1951) A.I.R. (Bombay) at 80, the learned trial judge was apparently not deterred by the circumstance that in yet another case cited to him, *i.e.*, *Governor-General in Council* v. *Peer Mohammad*, (1950) A.I.R. (East Punjab) 228, described in the law reports as a Full Bench decision, three judges of that particular Court declined to accept the authority of *Nazir Ahmad* v. *Emperor* (*supra*), as sound. Khosla, J., stated (see p. 232):— " As far as I am aware this expression (affairs of State) has not been defined anywhere, but it is clear that it cannot mean any and every matter in which the state is concerned. Otherwise, the privilege contemplated by section 123 would attach to every communication made by every officer of Government upon every subject. That, however, is not the law either in England or in India as it is manifest from a number of authorities on the subject. ' Affairs of State ' has always been interpreted in a somewhat narrow sense ", and again at page 233 :—

> " I would define ' affairs of State ' as matters of a public nature in which the State is concerned and the disclosure of which will be prejudicial to the public interest or injurious to national defence, or detrimental to good diplomatic relations."

He went on to say that, having regard to section 162 of the Evidence Act—(see page 234)— " In the case of a document relating to affairs of State the course of inspecting the document is not open to the Court, but this does not mean that the Court's right to adjudicate upon the validity of the objection is completely taken away thereby. The Court has still the right to take other evidence and determine whether the objection taken by the witness who was ordered to produce the document or the head of the department is, indeed, a valid objection. In other words, the Court has a right to satisfy itself that the document does, in fact, relate to affairs of State ".

Much argument was addressed to us by counsel for the respective parties as to the meaning of the section of the Evidence Ordinance we are called upon to construe on this appeal. On the one hand, Mr. Nadesan for the 1st respondent contended that the expression " affairs of State " must be given what he said was its natural and ordinary meaning of " business of the State " or " government business ". Mr. Jayawardene for the petitioner, on the other hand, argued that " affairs of State " is not synonymous with the expression " affairs of the State " and suggested that what has been called a restrictive interpretation should be placed in the context in which the particular expression appears. Extensive references to cases from England and other countries where common law is applied and where the question calls to be decided without reference to statute law, on the

one hand, and to cases from several jurisdictions in India where, on the other hand, as in Ceylon, the question is governed by statute, have been made.

The high authority of the Privy Council when it interpreted the relevant law of the State of South Australia in *Robinson* v. *State of South Australia*, (1931) A.C. 704, or the respect we must attach to the pronouncements of Viscount Simon, L.C., when the House of Lords in *Duncan* v. *Cammel Laird & Co., Ltd.*, (1942) 1 A.E.R. 587, laid down the law in England appears to me less relevant on the matter we are now considering than pronouncements of the Courts of India where the question is governed by a statute which on the essential points is in identical terms with the local statute which, no doubt, has itself been copied from the Indian Statute.

Our Evidence Ordinance of 1895 is described as an Ordinance to consolidate, define and amend the law of evidence. Lord Herschell, speaking of coded laws in the House of Lords while delivering judgment in *Bank of England* v. *Vaglianco Brothers*, (1891) A.C., at p. 145, observed that, " the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view ". The same viewpoint was set out trenchantly by Soertsz, J., in *The King* v. *Chandrasekera*, (1942) 44 N.L.R., at 122, where our Court of Criminal Appeal, called upon to decide a question arising in that instance, too, on the law of evidence, observed that we must shut our eyes to the English law of evidence except so far as a *casus omissus* renders recourse to it necessary and call to mind the provisions of our own Evidence Ordinance. It is necessary also to bear in mind that by section 2 (2) of that Ordinance all rules not contained in any written law so far as such rules are inconsistent with any of the provisions of the Evidence Ordinance were repealed.

On the question that now confronts the Court on this appeal, the learned trial judge did not have the advantage of considering a most important judgment of the Supreme Court of India in the recent case of *State of Punjab* v. *S. S. Singh*, (1961) A.I.R. (S.C.) 493, where five judges of that Court, with the assistance of able Counsel, considered the meaning of section 123 of the Evidence Act of India read along with section 162 of the same Act. Section 162 of the Evidence Act of India and section 162 of our Evidence Ordinance are in identical terms. The judgment of the majority of the Court refused to accept the authority of the Lahore High Court decision in *Nazir Ahamad's* case (*supra*) and noted that that decision had been dissented from by a Full Bench of the East Punjab High Court in *Peer Mohamed's* case (*supra*) and that the view taken by the Full Bench prevails in the Punjab High Court ever since. Having considered the reasoning in the judgment of the majority of the Bench that decided the case in the Supreme Court of India, I find it so convincing and of such persuasive value that I feel bound respectfully to apply it on the main question before us on the present appeal. Whether a document is an unpublished official record is easily ascertainable. Not so whether the record relates to affairs of State. The question nevertheless falls to be decided by the Court, and it is only where the Court decides that the record relates to an affair of State that it is required not to permit production or the giving of evidence derived therefrom without permission granted, therefore, by the Head of the Department. In delivering the judgment of the majority in the *State of Punjab* case (*supra*), Gajendragadkar, J., observed that it is " necessary to remember that where the Legislature has advisedly refrained from defining the expression " affairs of State " it would be inexpedient for judicial decisions to attempt to put the said expression into a straight jacket of a definition judicially evolved. The question as to whether any particular document or a class of documents answers the description must be determined in each case on the relevant facts and circumstances adduced before the Court". The majority rejected the contention that the expression " affairs of State " is synonymous with public business, but recognised a broad division of official records into two classes loosely described as innocuous and noxious, respectively. Into the noxious class which alone would comprise official records relating to affairs of State would fall records coming roughly within the description attempted by Khosla, J., noticed above. Arguments very similar to those addressed to us on behalf of the respective parties were addressed to the Supreme Court of India as well ; and—see page 503—the Court, after observing that on the point in controversy three views were possible, stated that in deciding the question as to which of these three views correctly represents the true

legal position under the Act it would be necessary to examine also section 162 of the Act, and preferred after such examination to accept the third view. That view is that the Court can determine the character of the document, and if it comes to the conclusion that the document belongs to the noxious class it must leave it to the head of the department to decide whether its production should be permitted or not for it is not the policy of section 123 that in the case of every noxious document the head of the department must always withhold permission. As the Supreme Court itself observed, that the view taken about the authority and jurisdiction of the Court is based on a harmonious construction of sections 123 and 162 of the Act ; it recognises the power conferred by the Court by clause 1 of section 162, and also gives due effect to the discretion vested in the head of the department by section 123. The main conclusion reached by the majority is stated thus :—see page 505 :—

> " Thus our conclusion is that reading sections 123 and 162 together the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide ; but the Court is competent, and, indeed, is bound, to hold a preliminary enquiry and determine the validity of the objections to its production, and that necessarily involves an enquiry into the question whether the evidence relates to an affair of State under section 123 or not. In this enquiry the Court has to determine the character or class of the document. If it comes to the conclusion that the document does not relate to affairs of State then it should reject the claim for privilege and direct its production. If it comes to the conclusion that the document relates to affairs of State, it should leave it to the head of the department to decide whether he should permit its production or not . . . In exercising his discretion under section 123 in many cases the head of the department may have to weigh the pros and cons of the problem and objectively determine the nature and extent of the injury to public interest as against the injury to the administration of justice. That is why we think it is not unreasonable to hold that section 123 gives discretion to the head of the department to permit the production of a document even though its production may theoretically lead to some kind of injury to public interest. While construing sections 123 and 162, it would be irrelevant to consider why the enquiry as to injury to public interest should not be within the jurisdiction of the Court, for that clearly is a matter of policy on which the Court does not and should not generally express any opinion."

It is unnecessary to say more here than that I respectfully adopt much of the reasoning in the judgment of the majority. I have quoted extensively from that judgment and, in doing so, may appear to have eschewed the accepting of the advice implicit in the passage appearing (at page 378) in a recent authority—*Board of Trustees of Maradana Mosque* v. *Minister of Education*, (1963) 65 N.L.R., at 378—that judgments should not be burdened with " copious quotations from other men's minds ". Should I, therefore, appear to have here disregarded that advice, my excuse is that while in reaching a decision in a particular case before him a judge must of necessity make the journey alone, he yet has, as I comprehend it, the comfort of the knowledge that in interpreting a law involved in that decision there is no bar to his voyaging in company and seeking a haven in the guidance of judges before him, albeit of other jurisdictions. The tradition of borrowing from the learning of others and acknowledging that debt blesses both him that lends and him that borrows.

I may add that Mr. Jayewardene questioned whether the statement in the judgment in the *State of Punjab* case (*supra*) that the second clause in section 162 should be construed to refer to the objections both as to the production and as to the admissibility of the documents is correct. Ordinarily one would be justified in inferring that where the legislature refers to production as well as admissibility in the first clause, but omits reference to production in the second clause, the omission was deliberate. Mr. Jayewardene suggested that logically admissibility should be considered before the question of production because if the document is held inadmissible there is no purpose in considering production. He, therefore, contended that there was no statutory bar to the inspection of the document by the Court for the purpose of deciding the question of production. Although the summons to produce specified the reports, argument proceeded on the basis that all that was required were the records of the speeches as made by the witnesses. No one can reasonably contend in this case that, if the reports in question contain records of statements made by the 1st respondent or his agents, such records are inadmissible. If, as I have held, the Court has to determine the character or class of the documents in question, there is, in my opinion, no difficulty in concluding in this case that the records made of speeches or utterances by a speaker at an election meeting in regard to the character of a candidate for election do not fall within the noxious class of documents referred to above. They, therefore, do not relate to affairs of State. For that reason I do not feel compelled in the circumstances to examine the soundness of Mr. Jayewardene's contention. I would answer the main question arising on this appeal and indicated earlier in favour of the appellant,

and say that the withholding by Court of permission to produce the records of the speeches as made by Police Constable Danapala in his report was an erroneous order of the learned trial judge.

In view of the conclusion I have reached on this main question, viz., that the records sought to be question did not relate to affairs of State, the question of obtaining the permission of the officer at the head of the department obviously does not arise. Anything that may now be said in this judgment as to whether the objection that was taken at the trial was, indeed, taken by the head of the department contemplated in section 123 would be in the nature of an *obiter dictum*. Accordingly, I refrain from examining the contention of Mr. Jayewardene that the objection was not taken in the trial Court by the proper officer. The determination of that question may require more evidence than is now available in the record. Nor do I consider it necessary to any anything here as to whether affidavits are admissible in support of objections raised under section 123.

The next and only other question that arises on this appeal is whether the conclusion that the trial judge was in error in upholding the objection to the production of the official record or the giving of any evidence derived therefrom has the effect *ipso facto* of necessitating a retrial of the charge of a corrupt practice in making false statements in relation to the personal character of the petitioner. Before the amendment to the Parliamentary Elections Order-in-Council introduced by section 25 of Act, No. 11 of 1959, it was doubtful whether the Supreme Court on appeal preferred under section 82A could order a re-trial. The 1959 Act, however, introduced the present subsection (3) of section 82B which is the following terms :—

> " The Supreme Court may, in the case of any appeal under section 82A, order that the election petition to which the appeal relates shall be tried anew in its entirety or in regard to any matter specified by that Court and give such directions in relation thereto as that Court may think fit."

I understand the above provision as vesting in the Court a discretion to decide whether a re-trial of the whole petition or a part thereof shall be ordered or not, and certainly not that on the reversal of any decision made by the trial judge the petition or a particular charge therein must be tried afresh.

In view of my conclusion that the records the production of which is sought do not relate to affairs of State within the meaning of section 123 of the Evidence Ordinance there does not appear to be any bar to our inspecting those records even at this stage for the purpose of assisting us in the exercise of the discretion vested in us in respect of a re-trial. I understand, however, that both my Lord and my brother Weerasooriya do not consider that we should now inspect these records for the purpose of making our decision on the remaining question. That is a view which I respectfully share with them. The question of a re-trial must, therefore, be considered without the advantage, if any, of an inspection of those records.

The position of the petitioner in regard to the question that now remains for decision would, in my opinion, have been stronge if the petitioner had at the trial refrained, after the Court made order upholding the objection to the production of the records, from leading any further evidence on the charge of a corrupt practice of making false statements. The argument on his behalf at the appeal was that if Police Constable Danapala had at the time he gave evidence in December, 1962, no recollection of what the 1st respondent said at the meetings held two and a half years before that, in July, 1960, apart from his records contained in his report to his superior officer, it was unreasonable to think that either of the other two constables would himself have had any independent recollection of speeches made about the time. The omission to call the other two constables at the trial, it was argued, was due to that reason as well as to the order made in respect of the objection to production of the official records. The petitioner, it must not be overlooked, made no attempt at the trial to call any other witnesses (save Inspector Piyadasa to whom I shall refer presently) to testify to the making of the false statements alleged. If there were any witnesses to testify as persons present at one or more of the election meetings to what was said by the 1st respondent at these meetings, they were certainly not called. Mr. Jayewardene stated in this connection that if the police constable who was called could not remember, independently of the record made, what was said at the meetings, and if the position of the other police constables was similar, it was unreasonable to think that other persons present at the meetings could after this long interval of time remember what was, in fact, said. He attributed the omission of the petitioner to call the other two con-

stables and other persons present at the meetings to the reason indicated by him. This argument loses its weight when one finds that the petitioner did, long after the ruling on the law that was the main subject of controversy on this appeal was made at the trial, call into the witness-box Inspector Piyadasa who was at the time of the election meetings the officer-in-charge of the Police Station to which the three police constables were then attached. Inspector Piyadasa had taken no notes himself, but the principal matter upon which he was called to testify was this allegation of false statements made by the 1st respondent. The learned trial judge has disbelieved Inspector Piyadasa. So far as we in this Court are concerned, there is no appeal to us available on a question of fact. We have to decide the question of ordering a re-trial without overlooking the circumstance that Piyadasa has been disbelieved. If we are unable to prevent Inspector Piyadasa being called to testify at a new trial—and that I understand is the view of the rest of the Bench—then, I fear, we are giving the petitioner a second chance, after a failure of the first, to see whether a trial judge will believe the evidence of Piyadasa. I do not think that in the context in which the trial judge stated in his judgment that " Inspector Piyadasa was speaking from memory about an incident that took place more than two-and-a-half years ago " he meant necessarily to imply that he would have been inclined to believe him if his evidence had received corroboration from that of Danapala. Taking action which would amount to giving the petitioner such a second chance is a course which places the 1st respondent at an unfair disadvantage, particularly as the trial judge has described Piyadasa " as a man having a bias against the 1st respondent which rendered his evidence suspect ".

Mr. Nadesan has suggested that as the records made by the police constables were not available to the petitioner, he must have taken statements from the proposed witnesses either when he prepared his petition or furnished the particulars to the 1st respondent on the application made therefor by the latter. He submitted that the witnesses could not have forgotten everything they said to the petitioner or his lawyers. He also suggested that, if the petitioner has not so taken statements from the witnesses he relied on when he decided to come to Court, he has made a charge without knowing whether there was evidence to support it. He stated that as the records have not been seen by either party as yet neither can say what the contents of the documents may or may not reveal. To order a re-trial in the circumstances now shown, to use Counsel's own words, would be to permit the petitioner " to fish for evidence ". In other words, the petitioner is attempting to establish a case on evidence the nature of which he yet does not know.

Mr. Jayewardene submitted that election petitions are not like ordinary litigation but are matters of public interest and must be considered " from the larger standpoint of the State " ;— *vide Don Alexander* v. *Leo Fernando*, (1948) 49 N.L.R., at 204. This submission is appropriate when one has to avoid a decision on an election petition being obtained by collusion. It can hardly be contended, much less maintained, that there is any fear of collusion in the present case.

If the charge of committing a corrupt practice by making false statements is to be tried anew, the witnesses will be called upon to testify, about four years after the event, to words uttered at meetings in July, 1960. Considering the long interval of time that has elapsed—a delay not attributable in any way to the 1st respondent—, I am unable to say that the discretion vested in this Court by section 82B (3) of the Order-in-Council requires to be exercised in favour of granting a re-trial at this stage. The charge is one in the nature of a criminal charge and it seems to my mind that justice will be met in this case by our making a decision on the question of law which will serve for occasions in the future without exercising in favour of the petitioner the discretion vested in the Court in the matter of re-trials. Such an order would, in my opinion, conform to the spirit of the rule embodied in the maxim *nemo debet bis vexari*, a rule to be encouraged in cases where considerable delay has already occurred. Such an order should be more readily made in a case where, as here, a citizen has already undergone successfully one trial on several allegations and what now remains is a fraction of the case on the merits of which, at

least, in part, a competent judge has expressed an opinion which we have no power in law to alter, and where the objection the upholding of which is now giving rise to the claim for a re-trial was one taken not by the party successful at the trial but by the head of the department within the meaning of section 123. Where objection has been so taken it will be wholly unreasonable to expect a person in the position of a respondent to an election petition not to support it. Moreover, as neither the Court nor any of the parties can yet say whether there is any evidence in the official records in support of the petitioner's charge, there is substance in the argument that if the Court orders a re-trial it would be doing so on a speculation that there is evidence available relevant to the charge to be now pursued.

For the reasons set out above, I am of opinion that this Court should not exercise the discretion vested in it by section 82B(3) in favour of granting a new trial on the charge of committing a corrupt practice in making false statements in relation to personal character of a candidate for election. As I am not in favour of exercising the Court's discretion so as to grant a re-trial, although the question of law arising on this appeal has been decided in the appellant's favour. I would make no order as to the costs of this appeal.

Appeal allowed. Sent back for re-trial on the charge of corrupt practice.

APPENDIX "A"

CROWN PRIVILEGE FOR DOCUMENTS AND ORAL EVIDENCE

LORD CHANCELLOR'S STATEMENT

A statement on Crown privilege was made in the House of Lords yesterday by the Lord Chancellor in reply to Lord Jowitt, who asked whether the Government had any statement to make on their policy in relation to the claiming of Crown privilege for documents and oral evidence.

The LORD CHANCELLOR said : " The Government has had under consideration for some time the whole problem of Crown privilege for documents and oral evidence. It is not a new problem, but has come into some prominence in recent years. This is not due to any extension of the principles on which privilege is claimed, but because since the Crown Proceedings Act, 1947, the Crown has been liable in tort or in delict and can be sued in the same way as private persons and that has thrown into relief its privileged position with regard to the production of documents and other evidence.

" With regard to documents," the Lord Chancellor continued, " the law in England, as laid down in the House of Lords case of *Duncan* v. *Cammell Laird*, (1942) A.C. 624, enabled Crown privilege to be claimed for a document on two alternative grounds ; first, that the disclosure of the contents of the particular document would injure the public interest, for example, by endangering public security or prejudicing diplomatic relations ; secondly, that the document fell within a class which the public interest required to be withheld from production, and Lord Simon particularized this head of public interest as ' the proper functioning of the public service '. The Minister's certificate of affidavit setting out the ground of the claim must in England be accepted by the Court. "

POSITION IN SCOTLAND

In Scotland Crown privilege could be claimed on either of those two grounds, but it was now clear from the decision in *Glasgow Corporation* v. *Central Land Board* that the Court in Scotland had an inherent power to override the Minister's certificate or affidavit ; but, as Lord Normand said in the *Glasgow Corporation* case " the power has seldom been exercised and the Courts have emphatically said that it must be used with the greatest caution and only in very special circumstances ". As far as he (the Lord Chancellor) knew it had only been exercised on two occasions in the last 100 years. The position in Scotland, therefore, although substantially different in principle, might not be very different in practice.

The claiming of Crown privilege on the first ground had always been acceptable to the Courts and public opinion. Where, however, the claim had been made on the ground that the document belonged to a particular class, especially in proceedings where the Crown's position seemed very like that of an ordinary litigant, it had been criticized on the ground that the administration of justice was itself a matter of public interest and should be weighed against the other head of public interest, *i.e.*, " the proper functioning of the public service ".

The reason why the law sanctioned the claiming of Crown privilege on the " class " ground was the need to secure freedom and candour of communication with and within the public service, so that Government decisions could be taken on the best advice and with the fullest information. To secure this it was necessary that the class of documents to which privilege applied should be clearly settled, so that the person giving advice or information should know that he was doing

so in confidence. Any system whereby a document falling within the class might, as a result of a later decision, be required to be produced in evidence, would destroy that confidence and undermine the whole basis of class privilege, because there would be no certainty at the time of writing that the document would not be disclosed.

FOR MINISTER

It was sometimes suggested that a claim for privilege on the class basis should be referred to and decided by a judge. This suggestion went much further than the position in Scotland, where the power of the judge was only exercisable " in very special circumstances " and did not permit any examination of the ground of the claim. This ground—namely, " the proper functioning of the public service "—must in the view of the Government be a matter for a Minister to decide, with his knowledge of government and responsibility to Parliament, rather than for a judge.

A judge assessed the importance of a particular document in the case that he was hearing, and his inclination would be to allow or to disallow a claim for privilege according to the contents and the relevance of the document, rather than to consider the effect on the public service of the disclosure of the class of documents to which it belonged. The result would be that the same kind of document would sometimes be protected and sometimes disclosed, and that would be destructive of the whole basis of the class claim.

Claims of Crown privilege were made in respect of all documents falling within the class, irrespective of whether their production would be favourable or unfavourable to the Crown's interests. All Crown lawyers were familiar with cases in which the Crown's interests had, in fact, been prejudiced by the application of the rule.

STRIKING THE BALANCE

The proper way to strike a balance between the needs of litigants and those of Government administration was to narrow the class as much as possible by excluding from it those categories of documents which appeared to be particularly relevant to litigation and for which the highest degree of confidentiality was not required in the public interest. " We have carried out an extensive survey of the field, and have certain proposals to make along these lines ", the Lord Chancellor continued.

A very large part of present-day Crown litigation consisted of actions arising out of accidents on the road or involving Government employees, or on Government premises. Where such an action was brought against a Government department, the most relevant documents were the reports of the employees involved and of other eye-witnesses. " In our opinion the Crown privilege ought not to be claimed for these documents, and we propose not to do so in the future ".

With regard to the report of a Government inspector, such as a factory inspector, the department was not concerned as an employer or an owner of property, but was exercising governmental functions, and different considerations arose. " We think that in this case the report should be privileged, but that the inspector should be allowed to give evidence on matters of fact ".

MEDICAL REPORTS

Secondly, medical reports and records had been considered. In the recent case of *Ellis* v. *The Home Office*, (1953) 2 Q.B. 135, judicial criticism was directed at a claim for privilege for reports made by a prison doctor which might have been relevant to the claim for negligence against the Crown. It was proposed, first, that ordinary medical records kept by departments in respect of the health of civilian employees should not be the subject of Crown privilege. In the case of medical reports and records in the fighting Services it was considered that privilege should still be claimed, so far as proceedings between private litigants, usually matrimonial proceedings were concerned. Service doctors owed a special duty to the commanding officer, and frank reports were essential. It was also important in the Services that a man should report readily to the medical officer, who was a doctor not of his choice but in whom he must have confidence ; this was especially so in the case of veneral disease. Some of these considerations applied to prison doctors, and their reports and records should still be privileged.

Where, however, the Crown or the doctor employed by the Crown was being sued for negligence, it was proposed that privilege should not be claimed. With regard to both proposals, there might be reports of a special confidential character which ought still to be privileged.

It was also proposed that if medical documents, or, indeed, other documents were relevant to the defence in criminal proceedings, Crown privilege should not be claimed.

In the *Ellis* case criticism was also made of a claim of privilege for a statement made to the police. Since that case a procedure had been established under which statements made by witnesses to the police were produced in Court on subpoena in civil cases and might be furnished earlier with the consent or at the request of the witnesses themselves. This would prevent a recurrence of what occurred in the *Ellis* case. The only exception, made for obvious reasons, was for statements by " informers ", *i.e.*, persons volunteering information about the commission of crimes.

In contract cases the documents passing between parties were the most relevant and were always disclosed. Other documents which affected the legal position, *e.g.*, an authority to an agent, were also disclosed. Moreover, reports on matters of fact, as distinct from comment and advice, might be relevant to the issues in Government contract cases, and it was proposed that, where such a distinction could be clearly drawn, factual reports should be excluded from the privileged class.

It might be that in other fields, in addition to accident and contract proceedings, it would be possible to evolve new categories of documents of a factual nature, which, without prejudice to the public interest, would also be excluded.

DEPARTMENTAL MINUTES

" We believe," the Lord Chancellor continued, " that our proposals will eliminate many of the grounds of complaint that have arisen in the past. I am assured by those responsible for Crown litigation that they will apply to the majority of cases coming before the Courts ".

As to departmental and inter-departmental minutes and memoranda containing advice and comment, and recording decisions, Crown privilege must be maintained.

" An important type of case in which documents of this kind may be relevant," the Lord Chancellor said, " is where the *vires* or legality of a Minister's decision is challenged, and the plaintiff may seek to show that the Minister proceeded on wrong principles. In such a case it is right that a Minister should be prepared to defend his decision, but if it became possible to challenge Government action, by reference to the opinions expressed by individual Civil servants in the necessary process of discussion and advice prior to decision, the efficiency of Government administration would be gravely prejudiced.

" Minutes may also be relevant to proceedings because they may contain comments upon the issues in the case and the question of liability. They are not of high evidental value, although admittedly they may be used effectively in cross-examination. It can hardly be said that their non-disclosure prejudices the administration of justice, and their disclosure would, in our opinion, prejudice government administration. For example, such actions as wrongful imprisonment, malicious prosecution or defamation may easily be concerned with events of public interest which give rise to comment in the Press and questions in Parliament. It is necessary and right that advice should be given at a high level in such cases, and that the advice should be entirely frank. It could not easily be given if it were subject to discovery in the subsequent proceedings."

ORAL EVIDENCE

As to oral evidence, it was plainly established and accepted that oral evidence of the contents of privileged documents could not be admitted. As regards evidence of oral communications, Crown privilege was claimed, much more rarely, on the same principles as in the case of written communications. It would be absurd, for example, if privilege could be claimed for a confidential minute passing from one official to another but not for a confidential conversation between them. " The proposals that we are making for reducing the scope of privilege for documents would apply to oral communications of the same kind ", the statement concluded.

Lord Jowitt, after expressing thanks for the statement, said that the problem it dealt with was not new. It caused a great deal of anxiety and worry to one of his predecessors and, he expected, to many of them. Obviously a great deal of thought had been given to the matter. It was desirable to cut down, so far as possible, in the interests of litigants, any exclusion of documents so long as that did not imperil the efficiency of the public service. Would the enforcement of the principles which the Lord Chancellor had enunciated involve legislation or the promulgation of rules, or could it be done by instructions to the Government departments concerned ?

The Lord Chancellor replied that no legislation was necessary. The improvements he had mentioned would come into force from now.

Lord Silkin asked whether the changes announced had been the subject of discussion with the Bar Council or the Law Society. Would those bodies have an opportunity of making comments on the improvements before they came into operation ?

The Lord Chancellor replied he had had the privilege of the views of the bodies mentioned, but he did not pretend that his proposals met their views in total. The Bar Council were anxious for a judicial decision on the matter. Their views had been taken fully into account by all who had examined the problem before the decisions announced were come to.

(*Extract from* " *The London Times* " *of* 7.6.1956, p. 15).

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

BARAMMANA VIPASSI NAYAKE THERO *vs.* URAPOLA JINARATANA THERO*

S.C. 108/61 (*Inty.*)—*D.C. Kandy, Case No.* 6112/*L.*

Argued on : November 1, 1963.
Decided on : November 11, 1963.

Pleadings—Amendment of plaint—Plaintiff claiming incumbency through tutor S.—Admission by plaintiff under cross-examination that his tutor had a co-pupil M., who was senior and who officiated as Viharadhipathy—That M. and S. had two pupils, one C. and the plaintiff—C. as senior to plaintiff, became incumbent of another temple belonging to tutor, leaving temple in question to plaintiff—Before next date of hearing plaintiff moving to amend plaint averring : (1) S., his tutor, was " de facto " Viharadhipathy after M's. death with plaintiff's permission; and (2) that C. abandoned his rights in favour of plaintiff—Should the amendment be allowed ?

Plaintiff sued four defendants for a declaration that he was entitled to the incumbency of Kiriwaula Vihara, claiming rights through his tutor, the last incumbent, Saranankara Thero. The defendants pleaded in their answer that one Sumana Thero, having been appointed by the dayakayas, was the Viharadhipathy of the temple, and after his death in 1959, the dayakayas appointed the 3rd defendant as his successor.

The plaintiff, giving evidence at the commencement of the trial, admitted under cross-examination:—

(*a*) that his tutor, Saranankara Thero, had a co-pupil, Medankara, who was senior to his tutor ;

(*b*) that Medankara officiated as Viharadhipathy ;

(*c*) that Medankara and Saranankara had two pupils, viz., Cuda Saranankara and the plaintiff. The former was robed earlier though ordained together ;

(*d*) that Cuda Saranankara became Viharadhipathy of another temple belonging to his tutor and the plaintiff claimed Kiriwaula Vihara and another ;

Before the next date of hearing, the plaintiff sought to amend his plaint by pleading :—

(*a*) that out of his two tutors Medankara became Viharadhipathy ;

(*b*) that though Cuda Saranankara was senior to the plaintiff, the former abandoned his rights to Kiriwaula Vihara and another in favour of the latter ;

(*c*) that although he succeeded Medankara as Viharadhipathy, his tutor, Saranankara, controlled these two Viharas with plaintiff's permission.

The learned District Judge upheld the objection taken by the defendants to the proposed amendments and the plaintiff appealed.

Held : That the proposed amendments should be allowed—

(*a*) as they sought to plead that Saranankara was only *de facto* Viharadhipathy, while Medankara was *de jure* Viharadhipathy ;

(*b*) as the plaintiff could succeed only if he could show that Cuda Saranankara had abandoned his rights ;

(*c*) as the cause of action was the same and the parties were the same ;

(*d*) as the proposed amendments sought to give the legal explanation of the actual position.

Per SANSONI, J.—" With respect, I am unable to uphold the learned Judge's order which loses sight of the important principle that the object of the rules governing amendment is to obtain a correct issue between the parties, just as the object of litigation is to adjudicate in real and not hypothetical matters in issue. If a mistake has been made in on original pleading, there is no objection to a correction being made in order to achieve these purposes, provided no injustice is done to the other party, who would normally receive adequate compensation in an order for costs. "

* For Sinhala translation, see Sinhala section, Vol. 8 part 2, p. 5

H. W. Jayewardene, *Q.C.*, with *S. S. Basnayake*, for the plaintiff-appellant.

Vernon Jonklaas, for the defendants-respondents.

SANSONI, J.

This is an appeal from an order refusing the plaintiff's application to amend his plaint.

The plaintiff sued to be declared entitled to the rights of residence in Kiriwaula Vihara and the control and possession of the Vihara and its temporalities, and that the defendants be ejected from certain lands described in the Schedule to the plaint. He pleaded that Saranankara Maha Thero was the former Viharadhipathi, and that on his death in 1956 the plaintiff as his senior pupil succeeded him. He alleged that the four defendants, who are the pupils of one Sumana Thero who had been placed in possession of the Vihara by Saranankara Maha Thero, were disputing his rights to this Vihara and its temporalities since the death of Sumana Thero in 1959.

The defendants in their answer pleaded that Sumana Thero had been appointed Viharadhipathi in 1922 by the dayakayas, and that on his death in 1959 they appointed the 3rd defendant to succeed him. They also pleaded that the plaintiff's claim was barred by prescription.

When the plaintiff was giving evidence at the commencement of the trial, he said under cross-examination that Weliwita Saranankara Maha Thero (his tutor's tutor) was Viharadhipathi of Gadaladeniya Vihara, Kiriwaula Vihara, and certain other Viharas appurtenant to Gadaladeniya Vihara ; that he died in 1893 leaving as his pupils, Medankara Thero and Saranankara Maha Thero, both of whom were the plaintiffs' tutors ; and that Medankara Thero who was the senior of the two became the Viharadhipathi and officiated as such till his death in 1921.

The plaintiff also said that Medankara and Saranankara had two pupils, Cuda Saranankara Thero and the plaintiff, the former of whom was robed earlier than himself although they were ordained together. Cuda Saranankara, according to the plaintiff, became the Viharadhipathi of Algama Vihara, while the plaintiff claims that he is the Viharadhipathi of Gadaladeniya and Kiriwaula Viharas.

On these admissions it became obvious that Cuda Saranankara as senior pupil of Medankara would be the rightful incumbent of all the temples belonging to this pedigree unless he had abandoned his rights to any of them. It also became clear that of the plaintiff's two tutors, Medankara and not Saranankara would have been the *de jure* Viharadhipathi of Kiriwaula Vihara ; and that the plaintiff's claim through the latter could not be maintained, since it was the plaintiff's case that the succession from the original Viharadhipathi was according to the rule of Sissiyanu sisiya paramparawa.

Before the next date of hearing, the plaintiff sought to amend his plaint by pleading that of his two tutors, Medankara, the senior tutor, became the Viharadhipathi, and that although Cuda Saranankara was the senior pupil of Medankara, he abandoned his rights to Gadaladeniya and Kiriwaula Viharas and waived his claim thereto in favour of the plaintiff. He also sought to plead that although he became the lawful Viharadhipathi after the death of Medankara, his tutor-priest, Saranankara, controlled Gadaladeniya and Kiriwaula Viharas with his permission and on his behalf.

The learned District Judge upheld the objections of the defendants to the proposed amendment—

(1) because there was a departure by the plaintiff from the facts pleaded in the original plaint, and

(2) because the application was not made in good faith and was an attempt to bring the pleadings into line with the admissions made in cross-examination.

With respect, I am unable to uphold the learned Judge's order which loses sight of the important principle that the object of the rules governing amendments is to obtain a correct issue between the parties, just as the object of litigation is to adjudicate on real and not hypothetical matters in issue. If a mistake has been made in an original pleading, there is no objection to a correction being made in order to achieve these purposes, provided no injustice is done to the other party, who would normally receive adequate compensation in an order for costs.

The plaintiff's original plea was that his tutor, Saranankara, was the Viharadhipathi. By his amendment he seeks to plead that Saranankara was only *de facto* Viharadhipathy while Medankara was *de jure* Viharadhipathi. Further, the plaintiff's claim to succeed Medankara can only succeed if he can show that his senior co-pupil, Cuda Saranankara, waived or abandoned his rights. It is true that the proposed amendments effect a change in the devolution of title pleaded by the plaintiff, but most amendments would have some such effect. The cause of action is the same and the parties are the same. The error as to the correct status of Saranankara may possibly have arisen through a mistake of law, for it was thought at one time that a " controlling Viharadhipathi " need not be the *de jure* Viharadhipathi. The proposed amendments seek to give the legal explanation of the factual position.

It should be said in the plaintiff's favour that his legal advisers acted promptly to set out what they conceive to be the correct position before the trial proceeded further. If they had delayed to suggest the proposed amendments, there might have been substance in the learned Judge's view that the suggested amendments were not made in good faith. No injustice can be said to be done to the defendants, by allowing the amendments, since they continue in possession of the temporalities to which they lay claim, and it cannot be said that their rights as existing at the date of the amendment are prejudiced in any way.

I would, therefore, allow the appeal and direct that the amended plaint dated 4th October, 1961, be accepted. Since the delay in making these amendments has put the defendants to expense which could have been avoided, the plaintiff should pay the costs of the abortive trial within two months of such costs being taxed ; if he fails to do so, the amended plaint will be struck out. I make no order as to the costs of the inquiry held on 16th October, 1961, or of this appeal.

H. N. G. FERNANDO, J.
I agree.

Appeal allowed.

Present : **Basnayake, C.J., and Sansoni, J.**

PERERA *vs.* DINGIRI MENIKA & OTHERS

S.C. No. 75/59—*D.C. Kandy, No. L.* 5087.

Argued and decided on : September 1, 1960.

Land Acquisition Act, No. 9 *of* 1950, *sections* 7, 9, 10, 11, 12—*Civil Procedure Code, section* 18—*Reference of claim or dispute to Court by acquiring officer under section* 10 (1) (*b*)—*Application to Court by parties who had made no claim before acquiring officer—Has Court jurisdiction to decide such claims—Whether provisions of section* 18 *of Civil Procedure Code applicable in such a case.*

Held : (1) That a person who has not made any claim to the acquiring officer in pursuance of the notice under section 7 of the Land Acquisition Act cannot thereafter make a claim before the District Court after the acquiring officer had referred to it any claim or dispute which arose at the inquiry held by him under section 9 of the Act. Inasmuch as such a claim was not before the acquiring officer, it could not have been referred by him to the District Court for determination and the Court would, therefore, have no jurisdiction to decide such a claim.

(2) That by virtue of section 12 of the Land Acquisition Act, the Civil Procedure Code applies to proceedings in Court after a reference by the acquiring officer under section 10.

(3) That, however, section 18 of the Code had no application to a case such as the present as the presence before Court of persons who are seeking to make a claim not made before the acquiring officer or to raise a dispute not referred to Court by him, is not necessary for determining the dispute referred by the acquiring officer to the Court for its determination.

Followed : *Templer* v. *Seneviratne*, (1892) 2 C.L. Reps. 70.
Assistant Government Agent, Kalutara v. *Wijesekere*, (1917) 4 C.W.R. 251.

Referred to : *Government Agent, Sabaragamuwa* v. *Asirwatham et al.*, (1928) 29 N.L.R. 367.

H. W. Jayewardene, Q.C., with *Vernon Jonklass*, *S. Sharvananda* and *L. C. Seneviratne*, for the 1st defendant-appellant.

No appearance for the plaintiff-respondent.

BASNAYAKE, C.J.

This is an appeal by the 1st defendant in a reference to the District Court made on 27th March, 1957, under section 10 (1) (*b*) of the Land Acquisition Act, No. 9 of 1950. That provision empowers the acquiring officer at the conclusion of an inquiry held under section 9 to refer the claim or dispute for the determination of a competent Court having jurisdiction over the place where the land which is to be acquired is situated. In his reference, which is in the form of a plaint, the acquiring officer stated—

" 2. That at the said inquiry dispute arose between the said defendants as regards their right, title or interest aforesaid, and it has become necessary under section 10 (1) (*b*) of the said Act to refer such dispute to this Court for determination.

" 3. That the plaintiff does hereby refer the said dispute to this Court for determination and states for the information of Court the particulars of the said dispute which are as follows :—

(1) The 1st defendant claims the entirety of the land.

(2) The 2nd defendant claims Rajakariya Rights in respect of about 70 acres of the land and claims compensation in a sum which if invested at 3% should bring an annual income sufficient to perform the Rajakariya claimed.

(3) The 3rd defendant claims Rajakariya Rights in respect of an extent of 3 roods 8 perches and claims 1/3rd of the value thereof as compensation. In addition he claims sole ownership of about 1 1/2 acres.

(4) The 4th, 5th and 6th defendants claim 2 acres of land jointly on Deed No. 3459 dated 18.5.1878, attested by R. D. Bastian, N.P.

(5) The 7th defendant claims 5 lahas of land on Deed No. 11830, dated 17th February, 1890, attested by J. A. Siriwardena, N.P."

The 1st defendant in his answer disputed the claims of the 2nd, 3rd, 4th, 5th, 6th and 7th defendants referred to in the reference. The 3rd defendant, the trustee of the Dalada Maligawa, filed an answer claiming Rs. 15,000/- out of the compensation as being the value of the loss of Rajakariya Services to the Maligawa. The 4th, 6th and 7th defendants filed a joint answer in which they prayed—

(*a*) that the 4th defendant be declared entitled to 1/18th share of the compensation awarded ;

(*b*) that the 6th and 7th defendants be each declared entitled to 1/12th share of the compensation in respect of the land described in schedule " A " of the answer and 1/4th share each of the compensation in respect of land described in schedule " B " thereof.

The 5th defendant died after the reference without filing an answer and on the application of the Government Agent his heirs were added as defendants.

At the hearing on 19th March, 1958, the 4th, 6th, 7th, 8th and 9th defendants appeared and abandoned their contests and admitted the title of the 1st defendant. The 2nd, 3rd and 5th defendants did not appear at the hearing. The Judge ordered decree *nisi* to be entered against them.

On 26th March, 1958, the Proctor for the 2nd and 3rd defendants moved that the decree *nisi* entered against them be vacated as the defendants did not appear on the day fixed for the hearing owing to inadvertence on his part.

On 28th May, 1958, after the Court had entered decree *nisi* in respect of some of the absent defendants, eight of the respondents to this appeal filed a petition in which they claimed that they were jointly entitled to " an undivided two-thirds share of the compensation in respect of the land " and prayed that they be added as defendants to the proceedings and that they be allowed to file their statements and that the Court do inquire into their claim ; and on 5th July, 1958, the 9th respondent filed a petition claiming that she was entitled to compensation in respect of 2/3rd share of an extent of two acres of the land and prayed that she be added as a defendant and that she be permitted to file a statement claim, of and that an inquiry be held.

On 20th May, 1959, the application of the Government Agent for the addition of the minor children of the deceased 5th defendant, the application of the Proctor for the 2nd and 3rd defendants, and the applications of the respondents to this appeal, were heard and allowed. The appellant does not complain against the orders in favour of the Government Agent and the 2nd and 3rd defendants. He has appealed against the order that the nine respondents to this appeal be added as defendants.

The learned District Judge has failed to give effect not only to the relevant provisions of the Land Acquisition Act; but also to the provisions of section 18 of the Civil Procedure Code which applies to proceedings under the Act by virtue of section 12 thereof. The material portion of that section reads—

> " (1) The proceedings in a Court on a reference made to it under section 10 shall be subject to the procedure provided by the Civil Procedure Code for civil suits."

A reference under section 10 is made at the conclusion of an inquiry held under section 9. An inquiry under that section is held into claims made in pursuance of a notice under section 7 directing every person interested in the land which is to be acquired personally or by agent duly authorised in writing to appear before the acquiring officer on the date and at a time and place specified therein after notifying in writing to the acquiring officer, at least, seven days before that date the nature of his interests in the land, the particulars of his claims for compensation, the amount of compensation and the details of the computation of such amount. The claim that the acquiring officer is authorised to refer to the Court for its decision is the claim made to him in pursuance of the notice under section 7 and the dispute referred to in section 10 (1) (*b*) is any dispute that may have arisen between any claimants who have made claims to him. The instrument of reference which the statute (section 11) requires should be in the form of a plaint in a civil suit, makes it clear in the prayer wherein the Government Agent asks for a determination of the dispute described therein. The jurisdiction of the Court under the Act is purely statutory and the Court has no power to determine claims or disputes not referred to it for its decision. The claims made by the respondents were not before the Government Agent and have not been referred to the Court for its determination. It has, therefore, no jurisdiction to decide them. Even section 18 of the Civil Procedure Code which can undoubtedly be resorted to in an appropriate case is of no avail in the instant case because the

presence of the respondents before the Court is not necessary for deciding the dispute under reference. The learned Judge quite properly exercised his powers under section 18 when he added the heirs of the deceased 5th defendant. That section enables the Court to add any person as a defendant to an action where a person ought to be joined or whose presence before the Court is necessary in order to enable it effectually and completely to adjudicate upon and settle the dispute or claim referred to the Court for its determination by the Government Agent. It does not empower the Court to add parties who make claims not made before the Government Agent or raise disputes not referred to it by him, because the presence of such persons before the Court is not necessary for determining the dispute referred by the Government Agent to the Court for its determination.

Our view finds support in the decisions of this Court under the Land Acquisition Ordinance which was replaced by the Act. Though the language of the relevant provisions of the Ordinance and that of the relevant provisions of the Act are not precisely the same, there is no substantial difference between them. In the case of *Templer* v. *Seneviratne*, 2 C.L.R. 70, a Bench of three Judges held that the Court has no power to decide matters other than those referred to it for its determination. In the case of the *Assistant Government Agent, Kalutara* v. *Wijesekara*, 4 C.W.R. 251, De Sampayo, J., observed :

> " The Court's jurisdiction is limited by the Ordinance ; it is either to make an award as to the amount of compensation where the claimants and the Government Agent are disagreed on that point or to decide the question of title to the land where there is any dispute among the claimants or where all the parties interested have not appeared before the Government Agent. The proceedings are purely statutory and do not, I think, admit of legal exceptions or dilatory pleas, as in an ordinary action, where the case falls under the first head of inquiry."

In this connexion the following observations of Withers, J., in *Templar's* case are relevant—

> " According to clause 19 of Ordinance No. 2 of 1889, which governed the procedure herein, no person can intervene in any action other than as provided by clause 18 of Ordinance No. 2 of 1889. The intervention of the additional claimants could not possibly be necessary for the adjudication of the question raised between the Government Agent and the four claimants who had attended in pursuance of the notice."

In the case of *Government Agent, Sabaragamuwa* v. *Asirwatham et al.*, 29 N.L.R. 367, where a land which was the subject of proceedings under the Land Acquisition Ordinance was transferred by the claimant while a reference to the Court was pending, the vendee was added as a party. That decision is consistent with the view we have taken, because the vendee's presence was necessary for deciding the matter of the reference.

We, therefore, set aside the order appealed from and send the case back to the lower Court for proceedings to be taken in due course.

The appellant is entitled to the costs of the appeal.

SANSONI, J.

I agree.

Appeal allowed.

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

KADAWATA MEDA KORALE MULTI-PURPOSE CO-OPERATIVE SOCIETIES UNION, LIMITED

vs.

A. RATNAVALE & ANOTHER

In the matter of an Application for a Mandate in the nature of Writs of Certiorari and/or Mandamus under section 42 of the Courts Ordinance.
S.C. Application, No. 311 of 1963.

Argued on : July 22, 24 to 26, 29 to 30, and November 20 and 28, 1963.
Decided on : December 12, 1963.

Writs of Certiorari and Mandamus—Revocation of authorisation given to wholesale dealer to deal in rationed commodities—Failure to give notice of intended revocation—Penalty in lieu of revocation—"Audi alteram partem"—Mandamus granted for reason other than that for which it had been invoked—No necessity to amend application—Food Control Act, No. 25 of 1950, section 8—Defence (Food Control) (Special Provisions) Regulations, 1943, Regulation 18 (1).

The petitioner Union, a wholesale dealer authorised by the 1st respondent, the Deputy Food Controller, in terms of the Food Control Act, to deal in rationed commodities, received the following letter (P 6), dated June 27, 1963 :—

"I hereby cancel the licence issued to the Kadawata Meda Korale Multi-purpose Co-operative Societies Union, Limited, as a wholesale dealer under clause 8 (1) of the Food Control Act, No. 25 of 1950."

Section 8 of the Food Control Act reads as follows :—

8 (1) : "The Food Controller may, if he is satisfied that any distributor, merchant or dealer has contravened the provisions of any Order or regulation made or deemed to be made under this Act, or if he considers it expedient so to do in the interests of the public, revoke any authorisation or directions, relating to the sale or supply of any food, article of food or cattle, issued to such distributor, merchant or dealer ".

8 (2) : "In any case where it would be lawful for the Food Controller in accordance with the provisions of sub-section (1) to revoke any authorisations or directions, he may, on an application made by the distributor, merchant or dealer, as the case may be, in lieu of such revocation, order such distributor, merchant or dealer to pay a penalty of an amount not exceeding five thousand rupees ".

Aggrieved by this cancellation, the petitioner applied to the Supreme Court on July 1, 1963, for the issue of writs *certiorari* and/or *mandamus* to, *inter alia*, quash the order purported to be conveyed by letter P 6.

Held : That the respondent was under a duty to give notice to the petitioner that he intended to revoke the authorisation granted to him so that the petitioner may decide whether he should make the application specified in section 8 (2).

Accordingly, the Court issued—

(*a*) a writ of *certiorari* quashing the order of June 27, 1963, contained in letter P 6, and

(*b*) a writ of *mandamus* directing the 1st respondent to give the petitioner notice of intended revocation of its authorisation as a wholesale dealer.

Cases considered : *Weeraratne* v. *Poulier*, (1947) 48 N.L.R. 441.
Edirisinghe v. *Rajendra*, (1948) 49 N.L.R., 498.
Ridge v. *Baldwin*, (1963) 2 A.E.R. 66 ; (1963) 2 W.L.R. 935.
Nakuda Ali v. *Jayaratne*, (1951) A.C. 66 ; 51 N.L.R. 457 ; XLIII C.L.W. 33
R. v. *Legislative Committee of the Church Assembly*, (1928) 1 K.B. 411.
Thassim v. *Edmund Rodrigo*, (1947) 48 N.L.R., 121.
Sachs v. *The Minister of Justice*, (1934) A.D. 11.
R. v. *Manchester Legal Aid Committee*, (1952) 1 A.E.R. 480 ; (1952) 2 Q.B. 413.

Text cited : *Judicial Review of Administrative Action*—Professor De Smith—(pages 46 and 279).

H. W. Jayewardene, Q.C., with *M. T. M. Sivardeen* and *L. C. Seneviratne*, for the petitioner.

A. C. Alles, Solicitor-General, with *V. Tennekoon, Deputy Solicitor-General, H. L. de Silva* and *P. Naguleswaran, Crown Counsel*, for the respondents.

T. S. FERNANDO, J.

This proceeding has been the subject of prolonged argument before me, and the application for the intervention of this Court has been strenuously pressed on behalf of the petitioner and equally strenuously resisted on behalf of the respondents. I have had the advantage of able arguments on both sides and I must here express my indebtedness therefor to learned Counsel.

The petitioner Union, a wholesale dealer authorised by the 1st respondent, the Deputy Food Controller, in terms of Regulations made under the Food Control Act, No. 25 of 1950, to deal in rationed commodities, received from the latter the letter P6 of June 27, 1963, which was in the following terms :—

> " I hereby cancel the licence issued to the Kadawata Meda Korale Multi-purpose Co-operative Societies Union, Limited, as a wholesale dealer under clause 8 (1) of the Food Control Act, No. 25 of 1950."

Aggrieved by this cancellation the petitioner moved this Court on July 1, 1963, claiming the issue by the Court of : (*a*) a writ of *certiorari* quashing the order purported to be conveyed by P6 as well as an earlier order made on June 3, 1963, (to which I shall refer later), (*b*) a writ of *mandamus* directing the 1st respondent to continue the supply of food and rationed articles as if there had been no cancellation of the licence, and (*c*) an interim order directing the 1st respondent to continue the supply of food and rationed articles to the petitioner pending the final hearing and determination of the application.

When the application came up before this Court on July 1, 1963, *ex parte* in the first instance, it was heard by Herat, J., and Abeyesundere, J., who, after hearing counsel in support, made order directing notice to issue on both respondents and also granting the relief (*c*) claimed by the petitioner, viz. an order that, pending the final disposal of the application, the revocation of the authorisation as a wholesale dealer be suspended and rendered inoperative and that " the usual food rations " be issued to the petitioner until the final disposal of the application. Upon receipt of notice of this interim order, the respondents applied to the Court on July 4, 1963, for a revocation of the order alleging that it had been obtained on a misrepresentation of a material fact, viz. the allegation in the petition and affidavit that unless the interim order was made the issue of weekly rations to some 117,000 ration card holders will be seriously jeopardised. It would appear that the motion for the vacation of the interim order could not be taken up for hearing before July 22, 1963, on account (1) of other work of the Court, and (2) of want of sufficient time for counsel to get ready for argument. The application came on for hearing before me on this last-mentioned date along with the motion for vacation of the interim order. The learned Solicitor-General contended that the order of this Court " suspending and rendering inoperative " the revocation of the authorisation of the petitioner had been made without notice to and without hearing the 1st respondent and that he was anxious to argue that that order cannot stand. I inquired from Counsel for the parties whether it would not be more satisfactory if I went on to hear the whole matter so that there may be a final determination of all the questions raised, a course in which learned counsel acquiesced.

The Food Control Act, No. 25 of 1950, (Cap. 171) which is an Act to make provision for the regulation and control of the distribution, transport and supply of food enables the Minister to make Order, *inter alia*, for the regulation and control of the supply, etc., of rice. Section 6 of the Act empowers the Minister to make regulations for the purpose of carrying out or giving effect to the principles and provisions of the Act, and in terms of that section certain regulations have been made and published in *Gazette*, No. 10,416 of June 20, 1952, and thereafter amended from time to time. These regulations bear the short title of The Food Control Regulations. Section E thereof governs the allocation and rationing of controlled commodities, and Part III of that Section relates to the supply and distribution of controlled commodities in places other than estates. Rice is a controlled commodity. It is subsidised both to the producer and to the consumer. Under Regulation 5 (1) of the said Part III, the Deputy or Assistant Food Controller for any district or area may, in order that supplies of any controlled commodity be made available for sale, in accordance with the

regulations, to the inhabitants of that district or area, inter alia, authorise such number of wholesale dealers as he may consider expedient to sell supplies of any controlled commodity to specified authorised distributors or persons in charge of depots. The Deputy Food Controller for the Ratnapura district authorised the petitioner, in terms of these regulations, to be a wholesale dealer in respect of Kadawata Meda Korale.

The petitioner states that on May 26, 1963, the 2nd respondent who is the Assistant Food Controller for the same District, acting on the orders of the 1st respondent, purported to inspect the stocks of rationed rice lying at the main store of the petitioner. The petitioner admits that on that occasion the 2nd respondent objected to the practice employed by the petitioner of issuing rice to the estates on a Friday and Saturday in respect of the week commencing on the following Monday for distribution to their labourers who are holders of rice ration books.

The petitioner received from the 1st respondent letter P1 of June 3, 1963, in which the allegation was made that " when the Assistant Food Controller inspected the petitioner's store at Balangoda, on May 26, 1963, a shortage of 1,170 cwts. 1 qr. 16 lbs. of white rice was detected ". It was further stated in P1 that " the subsidised value and the penalty at the rate of 25% (Rs. 58,760.40) should be paid into this office within 14 days from the date of this letter ". This is the order of June 3, 1963, referred to in the prayer of the petitioner. The petitioner replied to this by P2 of June 17, 1963, alleging that the statement that there was a shortage was false, that the petitioner was not given an opportunity of being heard before a demand for the value of the shortage and a penalty was made, that the action taken was not *bona fide* and had been designed for reasons of political expediency to assist the political opponents of the president of the petitioner Union. P2 also contained an enquiry as to the provision of law under which the demand for payment of subsidised value and penalty was made. Thereupon by letter P3 of June 23, 1963, the 1st respondent requested the manager, the storekeeper and administrative secretary of the petitioner Union to be present at the 1st respondent's office at 10.30 a.m., on June 26, 1963. The petitioner by letter P4 of June 25, 1963, inquired from the 1st respondent, with reference to the letter sent to the three officers above-mentioned, why those officers were wanted. It is alleged (and that allegation is not denied) that the petitioner had no officer styled " administrative secretary ". The manager and storekeeper, however, on June 26th attended the office of the 1st respondent where they were questioned on certain matters, and the manager was thereafter written to again (by P5 of June 26th)—this time with reference to the enquiry in P4—requesting him to be present at 10 a.m., on July 4th at the 1st respondent's office for an inquiry under the Food Control Act. This inquiry fixed for July 4th was not held because, by letter P6 of June 27th already referred to, the 1st respondent—despite the contents of P5—purported to cancel the petitioner's licence. P6 the terms of which have been reproduced earlier in this judgment does not indicate under which of the two limbs of section 8 (1) of the Food Control Act the cancellation was effected.

Section 8 (1) is in the following terms :—

> " The Food Controller may, if he is satisfied that any distributor, merchant or dealer has contravened the provisions of any Order or regulation made or deemed to be made under this Act, or if he considers it expedient so to do in the interests of the public, revoke any authorisation or directions, relating to the sale or supply of any food, article of food or cattle, issued to such distributor, merchant or dealer."

This sub-section (1) reproduces substantially the wording of regulation 18 (1) of the Defence (Food Control) (Special Provisions) Regulations, 1943—*vide Gazette*, No. 9131 of June 5, 1943. Under that regulation 18 (1) it had been provided that—

> " The Deputy Food Controller for any district or area may at any time, if he is satisfied that any authorised distributor or wholesale dealer has acted in contravention of or failed to comply with any provision of the Ordinance (No. 22 of 1937) or of these regulations or of the Control of Prices Ordinance, No. 39 of 1939, or of any order or regulation made thereunder, or if he considers it expedient so to do in the interests of the public, by Order revoke the authority granted or the directions issued to that distributor or dealer under Regulation 5 of this Part."

Where a Deputy Food Controller, acting under the said Defence Regulation 18 (1) revoked the authority granted to an authorised distributor of rice and flour because he considered it expedient so to do in the interests of the public, Dias, J., in *Weeraratne* v. *Poulier*, (1947) 48 N.L.R. 441, held that the Deputy Food Controller was acting in an administrative and not in a judicial capacity and that a writ of *certiorari* was not available to question the revocation. That learned judge, however, observed—(see page 444)—that " it may be that under the first part of regulation 18 (1) the Deputy Food Controller when making an order thereunder acts in a quasi-judicial capa-

city". In the following year in the case of *Edirisinghe* v. *Rajendra*, (1948) 49 N.L.R., at 500, Dias, J., expressed himself more definitely thus :—

> "It will be seen that sub-section (1) of regulation 18 creates two separate jurisdictions, namely, (*a*) the authority or licence may be revoked if the Deputy Food Controller is satisfied that a distributor or wholesale dealer has done something wrong, and (*b*) where the Deputy Food Controller considers it expedient so to do in the interests of the public. It is common ground between the parties that if, in this case, the Court holds that the authority of the petitioner was revoked under jurisdiction (*a*), the order cannot stand, because the respondent acted without jurisdiction inasmuch as the petitioner was not afforded an opportunity of being heard in his defence. On the other hand, it is agreed that if the petitioner's authority was revoked under jurisdiction (*b*), this would be a purely administrative matter and that the relief claimed cannot lie".

And again,—at page 501—

> "As I have already pointed out, section (regulation ?) 18 (1) creates two separate and distinct jurisdictions available to the Deputy Food Controller. The first jurisdiction arises only when he 'is satisfied' that there has been a breach or a contravention of the regulations. In such a case the officer acts judicially, and he cannot be said to be 'satisfied' until he has given the petitioner an opportunity of being heard. The second jurisdiction, which is not cognizable by the Courts, arises 'if he considers it expedient in the interests of the public' to revoke the authority or licence."

The petitioner complains that there has been no compliance by the 1st respondent with the *audi alteram partem* rule. The learned Solicitor-General contends that this rule of natural justice has to be observed only if the revocation of the authorisation granted to the petitioner was effected under the first limb of section 8 (1) of the Act. He points out that the 1st respondent effected the revocation by resorting to the second and not to the first limb of that sub-section. Mr. Jayewardene argued that in spite of the averments in the affidavit presented by the 1st respondent to this Court the facts disclose that he must have acted under the first limb. If so, he argued, there was no doubt that he was under a duty to act judicially and the writ of *certiorari* must issue as natural justice has been violated. It is, therefore, necessary to examine the material before me to decide under what part or limb of section 8 (1) the 1st respondent can be said to have acted.

In the absence of any indication in P6 itself which would assist in a decision of this question, one must fall back on a scrutiny of the affidavits.

The 1st respondent in his affidavit of July 4, 1963, states that while preliminary investigations were still being conducted by his assistant, the 2nd respondent, into the matter of the shortage, he received on June 26, 1963, from the Assistant Commissioner of Co-operative Development a copy of a letter of June 18th—R2—addressed to him by the petitioner together with a copy of that officer's reply to the petitioner—R1—by which the latter was requested to inform the 1st respondent of the action it (the petitioner) had taken. The 1st respondent goes on to state that on perusing the contents of R 2 he gathered that the petitioner had, after being apprised of certain irregularities, complied with the requirements of the law and with the directions issued by the 2nd respondent for one week and, alleging inconvenience, had decided to revert to the old practice and to continue to act in breach of the Food Control Regulations and contrary to the directions given by the 2nd respondent. He avers that he considered it not to be in the interests of the public to continue as an authorised wholesale dealer a person who had expressly declared his intention to act in contravention of the Food Control Regulations and directions issued by the 2nd respondent and that, accordingly, he considered it expedient in the interests of the public to revoke the authorisation granted to the petitioner to be a wholesale dealer. That he avers was the reason for revoking the authorisation by letter R 3 (same as P 6). Much argument could have been avoided in this case had the 1st respondent indicated in R 3 the limb of the section 8 (1) under which he made the revocation.

Mr. Jayewardene, for the petitioner, has argued that the statement in the affidavit that action was taken because the 1st respondent considered it not to be in the interests of the public to continue the petitioner as a wholesale dealer is an afterthought induced by a realisation on the part of the 1st respondent of the position that as a result of the non-observance of the rules of natural justice the revocation of the authorisation was liable to be quashed by this Court on the application made thereto on July 1, 1963. He points to the fact that there was no legal authority for the imposition of the penalty indicated in P 1. The petitioner has hitherto not been informed of the existence of any such authority, and the learned Solicitor-General himself could point to none. The 1st respondent's affidavit—*vide* para. 3—where it refers to P 1—states that "in addressing that letter I was not acting or purporting to act in the exercise of any judicial or quasi-judicial power. The letter was only a demand for payment of money which I thought was due to the

Crown ". It is also emphasized that the inquiry which was initiated by the 1st respondent, presumably as a result of the protest P 2, was still pending—it had actually been adjourned for July 4th—when the revocation was abruptly effected on June 27th. The petitioner by a second affidavit of July 7th has pointed to a letter, also bearing date, June 18,—P 16 D—which he states was sent by him to the 1st respondent, and which, it is contended, would have proved to the latter that the petitioner had no intention to act contrary to regulations or directions. These two documents, R 2 and P 16 D, are important in the determination of the question now being examined, and may usefully be reproduced below. They both bear the same date, June 18, 1963.

P 16 E (or R 2) addressed by the petitioner to the Assistant Commissioner of Co-operative Development is in the following terms :—

> " In view of the Deputy Food Controller's complaint we tried this week with very great difficulty to store our rice rations at the Union and issue rice on Monday and Tuesday. For this we had to curtail bringing provisions and other goods to find store accommodation. Yet we were unable to issue the rations although we worked up to 11.30 p.m.
>
> " As a result there had been some complaints from estates and authorised dealers. Hence we are reverting back to our old system."

while the terms of P 16 D are as set out below :—

> " In view of your complaint that rice should not be issued on Fridays and Saturdays, we wanted to give your suggestion a trial. To do so we had to stop bringing other essential goods and with difficulty store a part of the rice on our verandah and even outside at great risk. If there was rain a large quantity of the rice could have been damaged.
>
> " Although we worked till 11.30 p.m., on 17.6.63, with additional staff, we could not issue all our customers for the day.
>
> " In view of the many complaints and the impossibility of carrying out your order we wish to revert to the practice we have so far followed of issuing rice on Fridays and Saturdays, too.
>
> " We will be doing so from next week if we do not hear from you to the contrary in the meantime."

The 1st respondent denies by affidavit that there is any record of the receipt of letter P 16 D. The Secretary of the petitioner has submitted an affidavit of July 7th stating that letters P 16 D and P 16 E were both posted on June 8th and that this fact is borne out by the outward letter register which is in his possession. In these days of notorious uncertainty in the delivery of letters committed to the post, I am not able to reach a conclusion—faced as I am by the denial of the 1st respondent—that this letter P 16 D did reach the 1st respondent. On behalf of the 1st respondent it has been contended that even the statement that P 16 D was posted is open to doubt. It is submitted that, if P 16 D and P 16 E were written and posted on the same day, it is significant that in informing two officers of the same fact, two letters couched in language differing one from the other had to be resorted to. The simpler and more straight-forward course of action, the learned Solicitor-General commented, would have been to send the Assistant Commissioner of Co-operative Development an information copy of the letter addressed to the 1st respondent. There is, in my opinion, force in this comment.

Reaching, as I have done, the conclusion that on the material before me, the 1st respondent did not receive P 16 D, but had only P 16 E or R 2 before him, it is not possible for me to reject the assertion of the 1st respondent that in the matter of the revocation of the authorisation granted to the petitioner he acted under the second limb of section 8 (1) of the Act. Therefore, following the authority of the cases of *Weeraratne* v. *Poulier* (*supra*) and *Edirisinghe* v. *Rajendra* (*supra*), I am forced to the conclusion that the 1st respondent has not been shown to have been acting in a judicial or quasi-judicial capacity in taking the action that has been challenged on this proceeding.

Mr. Jayewardene next contended that, even if it be held that the 1st respondent was acting under the second limb of section 8 (1), there was an obligation on him to comply with the requirements of the *audi alteram partem* rule. He placed great reliance on the very recent decision of the House of Lords in *Ridge* v. *Baldwin*, (1963) 2 A.E.R. 66, where some doubt was cast on the decision of the Privy Council in *Nakkuda Ali* v. *Jayaratne*, (1951) A.C. 66, 51 N.L.R. 457, notably in the judgment of Lord Reid. The learned Solicitor-General, in subjecting the Food Control Act and the Regulations to close analysis, appeared to equate the authorisation granted to the petitioner to a licence or privilege, and thus to seek support for his argument for the exclusion of the remedy of *certiorari* in this case by reliance on the following observations of the Privy Council in *Nakkuda Ali's* case. Observed Lord Radcliffe in that case : " In truth when he cancels a licence he is not determining a question : he is taking executive action to withdraw a privilege because he believes

and has reasonable grounds to believe that the holder is unfit to retain it ". For the reason so stated the Privy Council held that the Textile Controller in that case had not the duty to act judicially. Subjecting a long line of cases decided by English Courts to close analysis, Lord Reid in *Ridge* v. *Baldwin* (*supra*) concluded that the judgment in *Nakkuda Ali's* case when it followed and applied Lord Hewart's statement of the law in *R.* v. *Legislative Committee of the Church Assembly*, (1928) 1 K.B. 411, at 415, 416, that before *certiorari* can issue, not only must the person or body have legal authority to determine questions affecting the rights of subjects but " there must be superadded to that the characteristic that the body has to act judicially " was given under a serious misapprehension of the effect of the older authorities and, therefore, cannot be regarded as authoritative. It must be noted, however, that of the other four judges who participated in the judgment of *Ridge* v. *Baldwin*, only Lord Hodson referred to *Nakkuda Ali's* case ; and he himself, when making but a passing reference thereto in connection with cases arising out of the issue and withdrawal of licences, observed " It may be that I must retreat to the last refuge of one confronted with as difficult a problem as this, namely, that each case depends on its own facts and that here the deprivation of a pension without a hearing is on the face of it a denial of justice which cannot be justified on the language of the sub-section under consideration ".

Counsel for the petitioner argued that, as the issue of mandates in the nature of writs of *certiorari*, *mandamus*, etc., under section 4 of the Courts Ordinance is governed by the relevant rules of English Common Law—*vide Abdul Thassim* v. *Edmund Rodrigo*, (1947) 48 N.L.R., at 128, and *Nakkuda Ali* v. *Jayaratne* (*supra*)—under English law today the decision in *Nakkuda Ali's* case must be considered to have been superseded by that in *Ridge* v. *Baldwin*. Accordingly he argued that this latter case calls to be applied as being the relevant English authority on the subject. Even if I were to make the assumption that is the basis of learned counsel's argument, I am bound to observe that I feel there is force in a submission put forward before me by Mr. Tennekoon on behalf of the respondents that in making the statements he has made in *Ridge* v. *Baldwin* in reference to *Nakkuda Ali's* case and *R.* v. *Legislative Committee of the Church Assembly* (*supra*), Lord Reid does not appear to have taken into consideration the circumstance that both these last-mentioned cases dealt with applications for *certiorari* or *prohibition*, while *Ridge* v. *Baldwin* was a case of a pure declaratory action. Had this last-mentioned case been one arising out of an application for *certiorari* or *prohibition*, and had, on a close analysis thereof, the majority decision of the House been shown to be that, where a person or body has legal authority to determine questions affecting the rights of subjects, the judicial element has to be inferred from the nature of the power I might have been constrained to consider seriously that the 1st respondent was under a duty to observe the *audi alteram partem* rule even when exercising his powers under the second limb of section 8 (1). But such not being the case, I consider it my duty to consider *Nakkuda Ali* v. *Jayaratne* (*supra*) binding on me. It may also be noted that Mr. Ridge was dismissed by the Watch Committee partly, at any rate, as the latter thought he was negligent in the discharge of his duty. Under section 191 (4) of the Municipal Corporations Act, 1882, the Watch Committee was empowered to dismiss any borough constable " whom they think negligent in the discharge of his duty, or otherwise unfit for the same ". Had the dismissal been effected solely because the Watch Committee thought Mr. Ridge was " otherwise unfit ", it appears to be doubtful whether the principles of natural justice would have had to be observed.

Mr. Jayewardene relied also on certain observations in Professor De Smith's treatise on Judicial Review of Administrative Action (see pages 46 and 279) in support of the argument that rights of individuals which attract the duty to act judicially are not necessarily " rights " in the jurisprudential sense of attributes to which correlative duties are annexed. But an attempt to equate the functions of the Food Controller or his Deputies under the Act and the Regulations to that of an ordinary licensing authority may lead to fallacious results. It is not an unimportant circumstance that under the Act and the Regulations the appointment of dealers and distributors is at the absolute discretion of the Controller or his Deputies. There is nothing revolutionary in the concept of licences or authorisations also being at the absolute discretion of these officers where they are satisfied that the public interests requires it. Referring to the maxim *audi alteram partem*, Stratford, A.C.J., in *Sachs* v. *Minister of Justice*, (1934) S.A.L.R.—A.D. 11, at 38, stated—

" Sacred though the maxim is held to be, Parliament is free to violate it. In all cases where by judicial interpretation it has been invoked, this has been justified on

the ground that the enactment impliedly incorporated it. When on the true construction of the Act, the implication is excluded, there is an end of the matter."

I would respectfully adopt this observation as being applicable even to the powers of our own Parliament. One has, therefore, to examine the relevant provision of the law to reach a decision whether it implies an observance by the authority concerned of the rule of natural justice. I do not consider that the interpretation of the relevant words here—" The Food Controller may, if he considers it expedient so to do in the interests of the public, revoke . . . "—admits of any serious argument. In taking action under the second limb of section 8 (1) the Food Controller (or his Deputy—see definition in section 3) is clearly deciding the matter on questions of policy. There is no room for the argument that the Courts can exercise any form of supervision or control in the decision as to what is or is not in the interests of the public. That is a decision committed by Parliament solely to the specified public officer. I, therefore, respectfully agree with the statement of law as laid down by Dias, J., in the cases cited above which arose out of the analogous Defence Regulations.

Does the law so laid down apply without qualification in a similar case arising out of the Food Control Act ? It appears to me that under the Act there is a significant difference that calls for notice. Section 8 of the Act contains a sub-section (2) which requires to be reproduced here :—

> 8 (2).—" In any case where it would be lawful for the Food Controller in accordance with the provisions of sub-section (1) to revoke any authorisation or directions, he may, *on an application made by the distributor, merchant or dealer*, as the case may be, in lieu of such revocation, order such distributor, merchant or dealer to pay a penalty of an amount not exceeding five thousand rupees ".

It has been suggested that the Act (No. 25 of 1950) was enacted in a time of peace, and that it was considered necessary to mitigate the rigour of the law which obtained in time of war and in the immediate post-war period when the food problem was acute by which a revocation of an authorisation was final and conclusive. Whatever may have been the reason that prompted Parliament to introduce sub-section (2), it is sufficient for the purpose of this judgment to note that an amendment of the law has been introduced and to ascertain its meaning. I cannot see that the language admits of any serious doubt. The existence of the phrase " where it would be lawful " in conjunction with " in lieu of such revocation " makes it reasonably plain that before revocation is effected either (*a*) by reason of a contravention having been made out, or (*b*) because it is expedient in the public interest, opportunity has to be given to the person affected to show that a penalty should be imposed rather than a revocation effected. The problem now reduces itself therefore, to one of plain construction of a statute. No doubt, the question of penalty versus revocation only arises upon an application by the party affected. But how is that party to make such an application unless he is given notice of the action intended to be taken by the statutory authority ? In the case of an alleged contravention of an order or regulation, an opportunity would have been granted to the person affected to prove the contrary before the Food Controller satisfied himself that a contravention was made out. An analogy would be the reaching of a verdict of guilty or not guilty in a criminal case. Even in such a case the statute appears to require that the Controller should inform the party affected that the contravention is proved to the Controller's satisfaction and then it is open to that party to apply for the substitution of a penalty. To continue the earlier analogy, this would be the stage of passing sentence where a verdict of guilty has been reached. Where action has been taken on the ground of expediency, in the interests of the public, the party affected may not know anything at all of his impending fate. If he first learns of the action taken only when he receives a letter revoking his authorisation, he is faced with a *fait accompli*, but it was argued that it is open to him to apply to mitigate the rigour of the revocation by the imposition on him of the lesser penalty. I am quite unable to agree that sub-section (2) of section 8 provides for mitigation of penalties already imposed. On the contrary, it is plain that in every case of intended revocation the party affected must be noticed of the action proposed to be taken so that he may, if so advised, apply for the substitution of the punishment indicated in that sub-section.

Learned counsel for the petitioner argued that, in view of the wording of the sub-section (2), as an opportunity had to be granted to the petitioner before its authorisation was revoked, the remedy by way of *certiorari* to quash became available. I entertain some doubt whether non-compliance with a statutory requirement such as the one in question is sufficient to convert what was essentially an administrative or executive act to an act which attracted to it liability to interference by way of *certiorari* or *prohibition*. I am not unmindful of those decisions where it has been held that the duty to act judicially may arise in the course of what is primarily an administrative function, *e.g.*, *R.* v. *Manchester Legal Aid Committee*, (1952) 1 A.E.R., at 489. I prefer, however, to rest my decision on the basis that here the Deputy Food Controller was, on a proper construction of section 8 (1) and (2), under a duty to give notice to the petitioner that he intended to revoke the authorisation granted to him before making the revocation itself so that the petitioner may decide whether he should make the application specified in section 8 (2). On that view of the law, the 1st respondent has failed to perform a statutory function which was a pre-requisite to action revoking the authorisation of the petitioner. The order P 6 or R 3 was therefore in my opinion, void.

Mandamus is a remedy which is available in the discretion of the Court to require public officials to carry out their duties and to supply a defect of justice even if there be another but less convenient and effectual remedy. In the exercise of this Court's discretion, I am of opinion that a mandate in the nature of a writ of *mandamus* should issue compelling the 1st respondent to give the petitioner notice of intended revocation of its authorisation as a wholesale dealer. *Mandamus* has been invoked on this application when it was first filed in this Court although, no doubt, the reason stated for such invocation is something other than that for which I now propose to grant it. It is always open to this Court to permit a petitioner to amend his application but, although for purposes of technical perfection an amendment of the prayer might have been insisted upon, I do not consider it necessary to require compliance at this stage with such a rule of technicality and delay the decision of this Court any longer when the argument of counsel for the parties has made it obvious that there is no defence to the demand for interference by way of '*mandamus*'. The order of June 27, 1963, communicated to the petitioner has, therefore, to be quashed. It is accordingly quashed, and a mandate will issue to compel the performance of the statutory function indicated above.

In view of the course the argument took before me, it is permissible to add that if all that can be adduced against the petitioner is that it has by taking the action indicated in P 16 E (or R 2) shown, in a letter addressed to a person other than the 1st respondent himself, a disinclination to comply with lawful directions issued by the authorities, the 1st respondent may yet be inclined to consider whether the interests of the public may not be sufficiently met by the imposition of an appropriate penalty in terms of section 8 (2). The petitioner has made an attempt to show that by P 16 D it indicated a willingness to comply with the directions if the 1st respondent insisted on such a compliance in spite of the difficulties experienced.

The petitioner has prayed also for a quashing of the "order" of June 3, 1963, contained in letter P 1 requiring it to pay a sum of Rs. 58,760.40 by way of subsidised value and penalty. The demand contained in P 1 has not been supported at the argument and, indeed, it did not appear to be doubted that the request could not be supported at law. I do not consider it necessary in the circumstances to deal with that part of the prayer.

The 1st respondent must pay to the petitioner the costs of this application. There was no necessity for the 2nd respondent to have been made a party to this application and, therefore, I make no order for costs as against him.

Application allowed.

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

THE QUEEN *vs.* W. V. DON LEELARATNE

S.C. APN/GEN/5/64—Revision in J.M.C., Colombo, 27178 *and* 27374.

Argued and decided on : February 28, 1964.

Penal Code, sections 367, 394—*Criminal Procedure Code, section* 325—*Is it applicable in a case where accused was charged with theft of two cars or alternatively with their retention as stolen property—Accused pleading guilty—Failure on the part of the Magistrate to consider admissible evidence against accused—Inadequacy of sentence—Factors which Judges should take into consideration in matters of sentence—Powers of Supreme Court to call for and examine records of proceedings in inferior Courts—Criminal Procedure Code, section* 356.

The accused was charged in two cases in the Joint Magistrate's Court, Colombo—viz., Nos. 27178 and 27374—with committing theft of two cars or in the alternative with the retention of stolen property.

The subject-matter of the 1st case was a car worth Rs. 10,000/- bearing No. 2 Sri 6014, reported stolen from the Fort on 11th February, 1963, and the accused was detected driving it at Norton Bridge on 1st March, 1963, with number plates 3 Sri 8694 and other number plates bearing EN 9804 in the luggage boot of the car. The accused was produced in Court and was bailed out in a sum of Rs. 3,000/- (certified bail) on 16th April, 1963.

The subject-matter of the 2nd case car No. 1 Sri 8439, of the value of Rs. 10,000/- was stolen on 22nd April, 1963, (six days after the accused was bailed out) from the Fort. On information received, the Police ambushed at Borella and arrested the accused while driving this car out of a garage on 24th May, 1963. A diary was found in that car containing the dates on which the accused had stolen cars noted in it.

In the second case, the accused was bailed out in a sum of Rs. 300/- with his wife as surety.

Both cases came up for trial before the Magistrate on 6th August, 1963, after he had assumed jurisdiction under section 152 (3). The accused who had pleaded not guilty earlier withdrew his former pleas and pleaded guilty in both cases. The Magistrate purported to consider these pleas of guilt as pleas of guilt for retaining stolen property, knowing or having reason to believe that these cars were stolen property and postponed the case for " identification and sentence ", for 9th August, 1963, on which day he called for a report from the Probation Officer.

Though probation was not recommended by this officer in his report which contained unfavourable references to the accused, the learned Magistrate proceeded to deal with the accused under section 325 of the Criminal Procedure Code. He accepted the accused's wife described in the said report as " living in fear of the accused " as surety in a sum of Rs. 500/- and bound him over to be of good behaviour for three years. He also in the 1st case ordered the accused to pay Rs. 250/- as Crown costs by monthly instalments of Rs. 20/- and in the 2nd case a sum of Rs. 100/- as Crown costs to be paid by monthly instalments of Rs. 5/-.

The Supreme Court having called for the records of proceedings of the said two cases and examined them by virtue of powers vested in it under section 356 of the Criminal Procedure Code —

Held : (1) That inasmuch as (*a*) the offences with which the accused was charged were not trivial ones ; (*b*) there was evidence which was properly admissible, that it was this accused who had stolen these cars ; (*c*) the report from the probation officer would have shown the Magistrate that these were not proper cases to be dealt with under section 325 of the Criminal Procedure Code, the accused should be convicted in each of the cases for theft under section 367 of the Penal Code and sentenced to two years' rigorous imprisonment, sentences to run consecutively.

(2) That section 325 of the Criminal Procedure Code would not be applicable to grave offences.

(3) That in bailing out the accused in the second case, the Magistrate had not exercised his discretion at all, and also he had failed to realize that offences under sections 367 and 394 are not bailable.

His Lordship proceeded to indicate what factors should be taken into consideration by Judges in the matter of sentence as follows :—

* For Sinhala translation, see Sinhala section, Vol. 8 part 3, p. 9

Per SRI SKANDA RAJAH, J.—" I proceed to quote from the case of *The Attorney-General* v. *H. N. de Silva*, 57 N.L.R., p. 121. At page 124, Basnayake, A.C.J. (as he then was) says this : ' In assessing the punishment that should be passed on an offender the judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. A judge in determining the proper sentence should first consider the gravity of the offence as it appears from the nature of the act itself, and should have regard to the punishment provided in the Penal Code, or other Statute, under which the offender is charged.

(2) : He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective.

(3) : The incidence of crimes of the nature of which the offender has been found to be guilty.

(4) : The difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though, no doubt, an important consideration, is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail.' (*The numbering is mine*).

To these I would respectfully add as follows :—

(5) : Nature of loss to the victim

In this case the loss to him was irreparable, especially in view of the prohibition on the importation of cars into this country. The victim would have been put to a great deal of inconvenience if he had to use the public modes of transport.

(6) : Profit that may accrue to the culprit.

In view of the shortage of cars in this country and the prohibitive prices of second-hand cars and also the demand for spare-parts, the profits to the culprit would be immense.

(7) : Also the use to which a stolen article could be put."

Cases referred to : *Fernando* v. *Alwis and Another*, (1939) 4 C.L.J. 111
The Attorney General v. *H. N. de Silva*, (1955) 57 N.L.R. 121

Observations on factors to be considered by a trial Judge in the matter of sentence.

D. R. Wijegoonewardene, for the accused.

D. S. Wijeysinghe, Crown Counsel, as *amicus curiae*.

Accused present on notice.

SRI SKANDA RAJAH, J.

I consider these two cases together because the Joint Magistrate, Colombo, himself dealt with these cases together on the same date, viz., August 6th, 1963, and thereafter.

In order to effectively deal with them I should set out certain details in chronological order. In case No. 27178 a car worth over Rs. 10,000/- was stolen from the Fort on 11th February, 1963, and the accused was detected in possession of this car on 31st March, 1963. This car originally had the number plates 2 Sri 6014, but at the time of detection it had the number plates 3 Sri 8694. The detection took place as a result of information received. The police ambushed at Norton Bridge, at 3.25 p.m., and at the time of detection two number plates bearing No. EN- 804 were found in the luggage boot of the car. The accused was driving the car. The accused was produced in Court on 3rd April, 1963, and he was bailed out in a sum of Rs. 3,000/- (certified bail) on 16th April, 1963.

Car No. 1 Sri 8439, which is the subject-matter of case No. 27374, was stolen from the Fort on 22nd April, 1963, *i.e.*, six days after the accused was bailed out. That car was worth also about Rs. 10,000/-. On information, the Fort Police ambushed at Borella on 24th May, 1963, at 5.30 p.m. and, while the accused was driving this car out of a garage, viz., the Baseline Motors, he was caught. The car still bore the same number plates. A diary was found in that car and the dates on which the accused had stolen cars had been noted in it. This diary was a production in the Magistrate's Court, and the Magistrate without even investigating as to what the contents of this diary were, accepted a plea of guilt from the accused in both cases and he proceeded to deal with the plea as a plea for the retention of stolen property, though in each case the accused was charged with committing theft or in the alternative with retention of stolen property.

Though this Court called for these records on certain information that I had received the Magistrate did not send this diary and then the diary was called for because I thought that there must be some information in this diary. This has been justified by the information given in this Court by the Inspector of Police and the entries in it.

In the first of these cases the revenue licence, which was issued in the name of Messrs. Aitken Spence, to whom this car belonged and which was used by Ronald Law, an executive working in that firm, was also found to be tampered with.

In the second of these cases the accused was bailed out in a sum of Rs. 500/- with his wife as surety, though he was out on bail in a sum of Rs. 3,000/- in the earlier case. This, to my mind, is either an invitation or an encouragement to the accused to commit further offences of this type. The Magistrate would have realised, if he had referred to the Schedule to the Criminal Procedure Code, that charges under sections 367 and 394 are non-bailable offences. I am not unmindful of the fact that even in non-bailable offences accused are bailed out, but that is done in the discretion of the Magistrate. In bailing out this accused in the second case the Magistrate did not exercise his discretion at all.

In the first of these cases, evidence was led on 27th May, 1963, the Magistrate assumed jurisdiction under section 152 (3), the accused pleaded not guilty and the case was fixed for trial. In the second of these cases, evidence was led on 25th June, 1963, the Magistrate assumed jurisdiction under section 152 (3) of the Criminal Procedure Code, the accused pleaded not guilty and that case was also fixed for trial. Both cases were before the Magistrate on 6th August, 1963. In both these cases the accused pleaded guilty. The Magistrate purported to consider these pleas of guilt in the two cases as pleas of guilt for retaining stolen property, knowing or having reason to believe that these cars were stolen property.

It might also be mentioned that the punishment for offences punishable under sections 367 and 394 of the Penal Code is three years. The Legislature in its wisdom had not made any distinction between these offences. Had the Magistrate only taken the trouble to find out what was in this diary he would not have treated the pleas as pleas in respect of retaining stolen property, because there was ample evidence in the hand-writing of the accused himself giving the dates of his stealing cars.

In each of these cases the Magistrate made order : " Identification and sentence on 9th August, 1963. "

Then on 9th August, 1963, he called for a report from the Probation Officer, and the Probation Officer's Report is of considerable interest. But, the Magistrate does not appear to have considered the report at all. The Probation Officer reported that the accused was not a fit case for being placed on probation. He reported : " *The wife seems to be living in fear of the offender* ". He further reported : " The investigations revealed that it was about one year back that he began to drive taxis and it was while working in this capacity that he got involved in this present offence. Apart from being dishonest in his dealings towards the latter part of his life he had been *keeping company with undesirable friends who are said to be engaged in stealing cars.* The investigations also revealed that he is very untruthful in providing information regarding his past, and this is an unsatisfactory basis where probation supervision is concerned. In fact, it was discovered during the latter part of the investigations that there is a pending case against the offender. This, however, was discovered from sources other than the offender. In view of the offender's unco-operative attitude and since there is a pending case against him, namely, case No. 12283/M.C. Kandy, where he had been charged of dishonestly using a forged cheque and which case has been set up for trial to the District Court it is not possible to recommend probation in this case. Probation is, therefore not recommended in this case. "

Though this report was staring the Magistrate in the face he proceeded to deal with this accused under section 325 of the Criminal Procedure Code. He accepted his wife, " *who is living in fear of this accused* ", as surety in a sum of Rs. 500/- and bound him over to be of good behaviour for a period of three years, and in the first case he ordered him to pay Rs. 250/- as Crown costs by monthly instalments of Rs. 20/- and in the second case a sum of Rs. 100/- as Crown costs to be paid by monthly instalments of Rs. 5/-.

Mr. Wijeygoonewardena who appeared for the accused and pleaded for clemency cited the case of *Fernando, Detective Inspector* v. *Alwis and another*, 4 Ceylon Law Journal, p. 111, and drew attention to a passage at p. 112 to the effect that a revisional Court will interfere only when the sentence passed was manifestly inadequate and

not merely on the basis that it would have passed a heavier sentence.

I am in respectful agreement with that observation ; but, are these sentences manifestly adequate ? I would hold that these sentences are manifestly and scandalously inadequate.

It has been repeatedly pointed out that section 325 of the Criminal Procedure Code would not be applicable to grave offences. It is perhaps useful to set out the terms of that section.

> 325 (1) : " Where any person is charged before a Magistrate's Court with an offence punishable by such Court, and the Court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to discharge the offender conditionally as hereinafter provided, the Court may without proceeding to conviction, . . . ".

In dealing, at least, with the second case, the antecedents of the accused should have influenced the Magistrate. Besides, these were not trivial offences, as I have already pointed out, and there was evidence which was properly admissible before the Magistrate, but he did not proceed to receive, that it was this accused who had stolen these cars. The report made by the Probation Officer would have shown the Magistrate that these were not proper cases to be dealt with under section 325. Therefore, I would proceed to conviction in each of these two cases under section 367 of the Penal Code.

I would also indicate what factors should be taken into consideration by Judges on the matter of sentence. I proceed to quote from the case of *The Attorney-General* v. *H. N. de Silva*, 57 N.L.R., p. 121. At page 124, Basnayake, A.C.J., (as he then was) says this : " In assessing the punishment that should be passed on an offender the judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. A judge in determining the proper sentence should first consider the gravity of the offence as it appears rom the nature of the act itself, and should have regard to the punishment provided in the Penal Code, or other Statute, under which the offender is charged.

(2) : He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective.

(3) : The incidence of crimes of the nature of which the offender has been found to be guilty.

(4) : The difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though, no doubt, an important consideration, is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail ". (*The numbering is mine*).

To these I would respectfully add :—

(5) : Nature of the loss to the victim.

In this case the loss to him was irreparable, especially in view of the prohibition on the importation of cars into this country. The victim would have been put to a great deal of inconvenience if he had to use the public modes of transport.

(6) : Profit that may accrue to the culprit in the event of non-detection.

In view of the shortage of cars in this country and the prohibitive prices of second-hand cars and also the demand for spare-parts, the profits to the culprit would be immense.

(7) : Also the use to which a stolen article could be put.

Stolen cars, it is well-known, are used for committing other offences, like burglary, abduction, and so on.

These are all matters that the Magistrate should have taken into consideration. He has failed to discharge his duty properly in dealing with these two cases. Therefore, in each one of these cases I would sentence the accused under section 367 to a term of two years' rigorous imprisonment. The sentence in the later case will begin to run at the expiration of that in the earlier one. The

amounts paid as Crown costs are to be returned to the accused.

Before I part with these cases I must also indicate the circumstances under which I came to send for these cases and to act by way of revision.

These cases were brought to my notice by a pseudonymous petition, copies of which had been forwarded to the Chief Justice and the Judicial Service Commission. Such petitions normally find their way into my waste-paper basket, of course, after I have read them. But when I read this petition I felt that there must be some substance in the allegations and that they should be verified.

Having been a Judicial Officer for a number of years, I was moved to make representations, over a decade ago, to the Criminal Courts Commission, presided over by Gratiaen, J., and of which Pulle, J., was a member, that there should be inspections of Magistrates' Courts by competent persons, not with a view to finding fault with their work, but with a view to assisting them in discharging their duties properly. This I did because I was aware of a growing public dissatisfaction regarding the manner in which cases were disposed of in Magistrates' Courts and an increasing tendency to make use of section 325 of the Criminal Procedure Code even in the case of very grave offences, this being done with an eye on the Quarterly Returns of disposals. This tendency, I felt, was not conducive to proper administration of justice.

Inspections of Courts would not be necessary if an Utopian state of affairs prevailed in our Courts. People concerned with the proper administration of justice should regard it as their duty to improve the administration of justice, so that there may be a feeling in the public mind that justice is being administered well and truly. Inspections should be carried out by a *competent* person, as I told the Criminal Courts Commission, competent not merely in the eye of the law, but competent to find out what is actually happening in Magistrates' Courts. I trust I will not be misunderstood if I say that it is not everybody who can put his finger at the proper place.

I know that once a Judge of this Court, who was holding Sessions in Jaffna was requested by the Chief Justice to inspect the District Court there and the District Court was inspected ; but, unfortunately, no copy of the report made by the Judge was sent to the District Judge. That sort of thing should not take place, for the reason the Judge whose Court is inspected is entitled to know in what way he could improve the administration of justice. Besides, common courtesy would demand that a copy of the report should be sent to him. Whenever I inspect a Court I make no report to anyone but merely draw the Judge's attention to how the work could be improved.

The Quarterly Returns are useful only if they reflect the actual state of affairs in the Court. But often they do not. I am aware of a Court from which there was not even a single appeal for a period of over two years. The quarterly returns must have revealed that to anyone who looked into them. If any one looked into them he should have realised that there was a Magistrate who was either perfect and infallible or that there was something radically wrong in that Magistrate's Court. A proper inspection would have revealed that what was happening in that Court should not happen at all.

It is common knowledge that even grave crime cases are disposed of in an unconscionable manner, as in the two cases now before me. This state of affairs should be remedied as early as possible.

I have questioned the two Inspectors of Police who were in charge of these prosecutions and tried to ascertain from them as to why they had not taken steps to get the Attorney-General to move by way of revision. They informed me that they had submitted their reports about the sentence to their superior officers ; but, anyway, they do not seem to have indicated to their superiors that these punishments were inadequate. I can understand the reluctance of police officers, who have to appear in this Court day in and day out, to incur the displeasure of the Magistrate ; but, it is their duty, regardless of consequences, to see that adequate punishment is meted out in such cases, specially in view of the numerous thefts of cars that have gone undetected in recent years. They should know that speedy disposal followed by adequate punishment is a sure deterrent.

Accused convicted.

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

HARAMANIS APPUHAMY *vs* INSPECTOR OF POLICE, BANDARAGAMA

S.C. No. 257/'64—*M.C. Panadura, No.* 78171.

Argued and decided on : 11th and 12th June, 1964.

Criminal Procedure, sections 312 (1), 338 (1) (*a*)—*Time within which an appeal should be preferred—How computed—Sentence—Section* 312 (1) (*v*) *inconsistent with section* 312 (1) (*c*)—*Need for attention of Legislature.*

Held : (1) That the time within which an appeal should be preferred under section 338 (1) of the Criminal Procedure Code must be computed from the date on which the reasons for the conviction and sentence were given and not from the date on which the conviction and sentence were entered.

Per SRI SKANDA RAJAH, J.—" Mr. Premaratne, very properly, drew my attention to the fact that under section 3 of the Knives Ordinance only a fine can be imposed and, therefore, the default sentence should be simple imprisonment and not rigorous, in view of section 312 (1) (*e*) (v). That section empowers the Magistrate in such case where there is no imprisonment mentioned as a punishment in the penal provision to pass a sentence of three months' simple imprisonment in respect of a fine of Rs. 50/- as in this case. I think this matter should receive the attention of the legislature ".

Dissented from :—*Jones v. Amaraweera*, (1939) XV C.L.W. 18.
The King v. *de Silva*, (1916) 3 C.W.R. 235.
Kershaw v. *Rodrigo*, (1916) 3 C.W.R. 44.

No appearance for the accused-appellant.

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

SRI SKANDA RAJAH, J.

When this matter was taken up yesterday, Mr. Premaratne, Crown Counsel, who appeared for the respondent, there being no appearance for the appellant, brought to my notice the case of *Jones* v. *Amaraweera*, 15 C.L.W. 18, which followed *The King* v. *de Silva*, 3 C.W.R. 235, and *Kershaw* v. *Rodrigo*, 3 C.W.R. 44.

In those cases it was held that the time within which an appeal should be preferred must be computed from the time on which the conviction and sentence were entered and not from the date on which the reasons for the decision were given. With great respect to the eminent judges who decided those cases I indicated that it appeared to me unreasonable to expect an accused who is convicted and sentenced to file the petition of appeal before the reasons for his conviction are known. I reserved judgment to consider this matter and today as Mr. Pullenayagam, Senior Crown Counsel, was in Court I invited his assistance. This Court is obliged to him for it.

Section 338 (1) of the Criminal Procedure Code reads thus :—

" Subject to the provisions of the last three preceding sections any person who shall be dissatisfied with any judgment or final order pronounced by any Magistrate's Court or District Court in a criminal case or matter to which he is a party may prefer an appeal to the Supreme Court against such *judgment* for any error in law, or, in fact—

(*a*) by lodging within ten days from the time of such *judgment* or *order* being passed . . ."

In this case the accused was convicted and sentenced to pay a fine of Rs. 50/- in default three months' rigorous imprisonment on the 2nd March, 1964. The reasons were delivered only on 16th March, 1964, and the petition of appeal was filed on 14th March, 1964.

If one follows these judgments one would have to hold that the accused's appeal was out of time. Section 338 (1) (*a*), which I have quoted above, states that an appeal can be lodged within ten days from the time of " such judgment ". Section 306 states, " The following provisions shall apply to the *judgment* of Courts other than the Supreme Court :—(1) The judgment shall be

written by the District Judge or Magistrate who heard the case and shall be dated and signed by him in open Court at the time of pronouncing it, and in cases where appeal lies shall contain the point or points for determination, the decision thereon, and the reasons for the decision ". This would clearly indicate that in cases where appeal lies the point or points for determination should be set out and the reasons for the decision should also be given. If one gives this interpretation to the word " judgment " in section 338 (1) one cannot resist the conclusion that an appeal can be filed within ten days of the delivery of the reasons (judgment). To take a different view seems to me to be unreasonable ; for, it would deprive the appellant of stating his objections to the reasons given in the judgment. Of course, it is true that in an appeal from the Magistrate's Court all the grounds of appeal need not be set out. But that alone should not be taken into account in considering section 338 regarding the time within which an appeal should be filed. Why should the accused be deprived of the opportunity to complain against the reasons given by the Magistrate ? Therefore, with great respect I would express my disagreement with the three judgments referred to above and I would hold that this appeal was filed within time.

Mr. Premaratne, very properly, drew my attention to the fact that under section 3 of the Knives Ordinance only a fine can be imposed and, therefore, the default sentence should be simple imprisonment and not rigorous, in view of section 312 (1) (*e*) (v). That section empowers the Magistrate in such cases where there is no imprisonment mentioned as a punishment in the penal provision to pass a sentence of three months' simple imprisonment in respect of a fine of Rs. 50/- as in this case.

That again seems to be inconsistent with the provisions of section 312 (1) (*c*). Take, for instance, an excise case in which the accused is charged under section 46 of the Excise Ordinance. In that case the Magistrate is empowered to pass a sentence of imprisonment which may extend to six months' rigorous imprisonment, to a fine which may extend to Rs. 1,000/- or to both. In such a case if the Magistrate imposed a fine and in default of the fine he can sentence the accused only to a term not exceeding one-fourth of the imprisonment of six months mentioned in the section, *i.e.*, only six weeks.

Though section 46 of the Excise Ordinance prescribes both imprisonment and/or fine it seems unreasonable that in a case where a man is liable to pay a fine of Rs. 50/- and not to imprisonment he should be liable to imprisonment in default to a term which may extend to three months. I think this matter should receive the attention of the Legislature.

I see no reason to interfere with the conviction or the sentence of fine but I alter the default sentence to three weeks' simple imprisonment.

Appeal dismissed
Sentence varied.

Present : **Sirimane, J.**

S.C. 106/'64—*Magistrate's Court, Rakwana Case No.* 77836.

KEERTHISENA *vs.* PODIMENIKE

Argued on : April 30, 1964.
Decided on : May 11, 1964.

Criminal Procedure—Maintenance case—Applicant's right to call evidence after the defendant's case closed.

Held : That as the procedure followed in maintenance cases is that followed in Criminal Courts, an applicant in a maintenance case should not be permitted to call fresh evidence after the defendant's case has been closed except on a matter arising *ex-improviso.*

Referred to : *The Queen* v. *Wilbert*, 64 N.L.R. 83.

Dr. Colvin R. de Silva with *P. O. Wimalanaga*, for the defendant-appellant.

M. M. Kumarakulasingham, for the applicant-respondent.

SIRIMANE, J.

The applicant-respondent in this case sued the defendant-appellant claiming maintenance for her illegitimate child. The defendant-appellant denied paternity.

The applicant-respondent stated in evidence that she was an employee in the household of a Village Headman, that the defendant-appellant a neighbour had visited her, and become sexually intimate with her, that on one occasion the two of them had been found in a compromising position by the Village Headman's wife, and that on this discovery the Village Headman complained to her father who took her away to his house, where the defendant-appellant continued to visit her, till shortly before her child was born. The Village Headman, his wife, the applicant-respondent's father, all gave evidence supporting her.

The defendant-appellant denied paternity and called as his witness a Midwife named Luciya who stated that the applicant-respondent had told her that the father of the child she was carrying was one Gunawardena, which fact she noted in a booklet which was produced at the trial marked D 1.

The learned Magistrate accepted the evidence of the applicant-respondent and her witnesses as set out above, and rejected the evidence of the defendant-appellant and his witness.

Dr. Colvin R. de Silva for the defendant-appellant complained that there has been " a violation of procedure " in that the Magistrate permitted a witness (Dr. Thevendram) to be called after the cases for the applicant and the defendant were closed, and he urged that the case be sent back for re-trial.

A perusal of the record shows that on 12th July, 1963, after the defendant-appellant's case was closed, the learned Magistrate made order " Further inquiry on 26th July, 1963 ". The record does not show the reason for this order, but apparently some application seems to have been made by the applicant-respondent's proctor, for after a few postponements the record reads :—

" Mr. Molamure moves to call Dr. Thevendram. Mr. Muththettuwegama has no objection."

Thereafter the evidence of Dr. Thevendram was led, which was to the effect that when the applicant-respondent entered hospital for her confinement she gave the name of the defendant-appellant as her " guardian ".

Dr. Colvin R. de Silva cites the case of *Queen* v. *Don Wilbert*, 64 N.L.R., p. 83, where the Court of Criminal Appeal held that it was not open to the Court to call or allow fresh evidence to be led for the prosecution after the case for the defence has been closed unless a matter arises *ex-improviso*.

In maintenance cases the procedure is that followed in the Criminal Courts and I am inclined to agree with the contention of Dr. Colvin R. de Silva that an applicant should not be permitted to call fresh evidence after the defendant's case has been closed except on a matter arising *ex-improviso*.

In this particular case, quite apart from Dr. Thevendram's evidence there was ample evidence to support the finding of the learned Magistrate.

Dr. Colvin R. de Silva submitted that it was Dr. Thevendram's evidence that led the Magistrate to disbelieve the Midwife called by the defendant-appellant. There is no reason to draw such an inference. The learned Magistrate has disbelived the Midwife, held that D 1 was fabricated, and expressed himself in strong language on this point. He has, no doubt, contrasted the evidence of the Midwife and the document D 1, with the evidence of Dr. Thevendram and his record of the applicant-respondent's statement, but that does not mean that he used Dr. Thevendram's evidence to disbelieve the Midwife.

I see no reason to interfere with the learned Magistrate's findings on the facts, nor do I think that a re-trial should be ordered.

The appeal is dismissed with costs.

Appeal dismissed.

Privy Council Appeal, No. 17 *of* 1963.

Present : **Viscount Radcliffe, Lord Morris of Borth-Y-Gest, Lord Guest.**

MAHADEVA SIVARAJAH *vs.* GENERAL MEDICAL COUNCIL

From
THE DISCIPLINARY COMMITTEE OF THE GENERAL MEDICAL COUNCIL

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

DELIVERED THE 19TH NOVEMBER, 1963.

Privy Council—Appeal thereto from decision of General Medical Council—What constitutes misdirection resulting in invalidation of proceedings—Legal Assessor—Extent and nature of powers and duties—General Medical Council (Procedure) Rules, 1958*—Statutory statement made under Rule* 5*—When use permissible.*

The appellant, a registered medical practitioner, was found guilty of infamous conduct in a professional respect by the Disciplinary Committee of the respondent General Medical Council, on the ground of adultery with the complainant, during a period beginning in June or July, 1954, and continuing in September, 1961. In a letter to the Committee of inquiry, the appellant had stated that he had not had sexual relations with the complainant " prior to 1960 ". The legal Assessor, advising the Committee stated that " one may infer from that, that he is not prepared to deny having had sexual relations with her since some time in 1960 and you have certainly then that part of her evidence corroborated which deals with the last year of this association ". The appellant appealed on the ground *inter alia*, that the Legal Assessor's advice as to the corroborative value of the appellant's letter was incorrect.

Held : (1) That it would have been preferable if the advice tendered had been that the letter was capable of being considered as corroboration of the complainant's evidence, but that it was for the Committee to judge whether it in fact, did so.

(2) That the Legal Assessor's position was not that of a judge summing-up to a jury. His duties were confined to advising on questions of law referred to him or intervening in order to inform the Committee of any irregularity in the conduct of their proceedings or advising them of a possibility of a mistake of law being made. Thus what might have amounted to a misdirection in law by a judge to a jury at a criminal trial does not necessarily invalidate the Committee's decision, as the Committee itself were the masters of both fact and law.

(3) That an appeal to the Privy Council must fail unless it revealed some defect in the conduct of the inquiry that may fairly be thought to have been of sufficient significance to the result to invalidate the Committee's decision.

(4) That despite the warning of the assessor of the danger of a finding of adultery on uncorroborated evidence, the Committee could, considering the weight of evidence, even though uncorroborated, come to a valid finding that the appellant was guilty of adultery.

(5) That in general it is undesirable that any use should be made of a statutory declaration except to the extent that it is made evidence by being made use of by the petitioner or his Counsel.

Case referred to : *Fox* v. *General Medical Council,* (1960) 1 W.L.R. 1017 ; (1960) 3 A.E.R. 225 (P.C.).

Peter Ripman for the appellant.

Peter Boydell for the respondent.

LORD GUEST

This is an appeal from the decision of the General Medical Council Disciplinary Committee that the appellant had been guilty of infamous conduct in a professional respect and directing that his name be erased from the Medical Register.

The charges against the appellant were :—

"That, being registered under the Medical Acts,

(1) During a period commencing in June or July, 1954, and continuing until September, 1961, you improperly associated with Mrs. Dorothy Armstrong, who formerly resided at Pools Park, London, N. 4, and from and after a date in or about September, 1954, you frequently committed adultery with her both at her home and at your surgery, at 39, Stroud Green Road, London N. 4 ;

(2) You stood in professional relationship with Mrs. Armstrong at the material times.

And that in relation to the facts alleged you have been guilty of infamous conduct in a professional respect."

After two abortive hearings on 30th November, 1962 and 26th February, 1963, on the first of which the appellant had not timeously instructed his solicitors and on the second of which he was confined to bed in hospital the hearing took place on 29th May, 1963. The appellant had intimated to the Committee that he was not to be represented and that he wished the hearing to take place in his absence. Evidence was accordingly heard by the Committee without the appellant being present or being represented.

The only witness who gave evidence at the hearing was the complainant, Mrs. Dorothy Forbes, also known as Mrs. Armstrong, who was represented by Counsel. Her evidence was that she was a married woman living in 1954 with her husband and baby daughter, Angelia, at 60, Pools Park, London, N. 4 ; that in 1954 Angelia was transferred to the appellant's list of National Health Service patients ; that on 31st August, 1954, she (Mrs. Forbes) was transferred to his list ; that the appellant continued to give treatment to Mrs. Forbes and her daughter from September, 1954, until September, 1961 ; that on an occasion in September, 1954, at his surgery at Tollington Park he told her that he was in love with her ; that throughout the period from January, 1955, until September, 1961, the appellant frequently committed adultery with Mrs. Forbes at his surgery at Tollington Park, at his surgery, at 39, Stroud Green Road, London, N. 4, and at her home which was successively at 60, Pools Road, 16, Landrock Road, London, N. 8, and at 5, Dresden Road, London, N. 19.

She produced a piece of blotting paper on which in 1954 the appellant had written his telephone number and the time of day at which Mrs. Forbes might speak to him on the telephone. She also produced a copy of a Memorandum of Agreement, dated 17th October, 1959, on which the signatures of the appellant and Mrs. Forbes appeared as joint-hirers of certain furniture. There was some doubt when Mrs. Forbes was removed from the appellant's list of National Health Service patients. She said in evidence that it was in November, 1959. This was clearly wrong. A document produced at the hearing suggested that the proper date was 5th February, 1960, which was probably correct.

Upon this evidence the Committee found the following facts proved to their satisfaction :—

"That, being registered under the Medical Acts,

(1) During the period commencing in June or July, 1954, and continuing until September, 1961, you improperly associated with Mrs. Dorothy Armstrong who formerly resided at Pools Park, London, N. 4, and in the course of that association you frequently committed adultery with her both at her home and at your surgery, at 39, Stroud Green Road, London, N. 4.

(2) You stood in professional relationship with Mrs. Armstrong at the material times."

They further held that the appellant had been guilty of infamous conduct in a professional respect and decided that his name be erased from the Register.

Counsel for the appellant urged before the Board a number of points which he argued cumulatively should result in the Committee's decision being reversed. Before considering these points it is necessary to state the function of the Board in relation to appeals under the Medical Act, 1956. In *Fox* v. *General Medical Council*, (1960) 1 W.L.R., 1017, Lord Radcliffe, after stating the considerations affecting such appeals said : " Such considerations, which are unavoidable in appeals of this kind, do sometimes require that the Board should take a comprehensive view of the evidence, as a whole, and endeavour to form its own conclusion as to whether a proper inquiry was held and a proper finding made upon it, having regard to the rules of evidence under which the committee's proceedings are regulated ". Later, he said : " It follows that the appeal must fail unless there was some defect in the conduct of the inquiry, by way of admission or rejection of evidence or otherwise, that may fairly be thought to have been of sufficient significance to the result to invalidate the committee's decision ".

With these principles in view Their Lordships approach the grounds of this appeal.

It was said that the Committee's finding went further than the charge in that the period of the appellant's adultery was extended back to June or July, 1954, instead of September, 1954, the date in the charge. Their Lordships consider that there is no substance in this point. The Committee's finding was that in the course of the improper association between June or July, 1954, and September, 1961, the appellant frequently committed adultery with Mrs. Forbes. This finding of adultery was, therefore, not limited to the period between June or July, 1954, and September, 1954, but extended over the whole period. In any case no question turned on the precise date when the adultery commenced.

A cogent criticism of the proceedings related to an observation made by the Legal Assessor in the course of his advice to the Committee. In the course of Mrs. Forbes' evidence at the hearing a document was produced purporting to be a letter dated 23rd May, 1963, from the appellant to the Committee in which he stated " I have no solicitor to represent me. I wish the hearing to take place in my absence ". To this letter was attached a statement of the same date giving his replies to the complainer's statutory declaration which had been sent to him on 15th August, 1962. The relevant portions of the statement are : " (i) I deny having had sexual relation with Mrs. Forbes—prior to 1960. The facts in her statement are prefabricated lies ". " (vii) Mrs. Forbes came off my list on 6-2-60, and not November, 1960 ". In the course of his advice to the Committee upon the invitation of the President the Legal Assessor said :

> " Mr. Rose (Counsel for Mrs. Forbes) is plainly right as a matter of law, and, in fact, it is a matter of ordinary common sense, that one may infer from that that he is not prepared to deny having had sexual relations with her since some time in 1960, and you have certainly then that part of her evidence corroborated which deals with the last year of this association."

It would have been preferable if the advice tendered had been that the letter was capable of being considered as corroboration but that it was for the Committee to judge whether, in fact, it corroborated the complainer's evidence and that is what the Legal Assessor clearly meant to say, although it was perhaps unfortunately expressed. The Legal Assessor is, however, in no sense in the position of a judge summing-up to a jury nor is the Committee's function analogous to that of a jury. The Legal Assessor's duties are confined to " advising on questions of law referred to him and to intervention for the purpose either of informing the Committee of any irregularity in the conduct of their proceedings which comes to his knowledge, or of advising them when it appears to him that but for such advice, there is a possibility of a mistake of law being made ", (*Fox* v. *General Medical Council*, (1960) 1 W.L.R., 1017, Lord Radcliffe, at p. 1021). The Committee are masters both of the law and of the facts. Thus what might amount to a misdirection in law by a judge to a jury at a criminal trial does not necessarily invalidate the Committee's decision. The question is whether it can " fairly be thought to have been of sufficient significance to the result to invalidate the Committee's decision ". Their Lordships do not consider that the advice by the Legal Assessor amounted to such a defect in the conduct of the inquiry.

There is some doubt as to whether in the absence of proof that the document of 23rd May, 1963, was in the handwriting of the appellant it was evidence which might properly be considered by the Committee as implicating him. Moreover, Their Lordships do not know whether the Committee did consider that the appellant's statement : " I deny having had sexual relations with Mrs. Forbes—prior to 1960 " amounted to corroboration of her evidence of adultery after

1960. This is inevitable in view of the nature of the hearing. Their Lordships do not, therefore, find it necessary to decide whether the statement amounted to corroboration.

Some attacks were made by counsel on the credibility of Mrs. Forbes, the principal attack being based on the fact that in her petition for divorce from her husband on the ground of his cruelty, decree absolute in which was pronounced on 2nd August, 1960, she concealed from the Court her adultery with the appellant. But these and the other discrepancies in her evidence referred to by counsel were eminently matters for the Committee who saw and heard Mrs. Forbes. Apart from these considerations the fact that the appellant did not appear or give evidence at the hearing was a matter to which the Committee were well entitled to have regard.

If her evidence was accepted by the Committee there was ample evidence to justify the Committee's finding. The Legal Assessor warned the Committee in the clearest possible terms of the danger of a finding of adultery on the uncorroborated evidence of Mrs. Forbes and that they should look anxiously for some corroboration, but if they believed her evidence they were entitled to make their finding in the absence of corroboration. Therefore, having this warning before them even if the Committee did not find corroboration in the appellant's statement they were quite entitled to come to the conclusion which they did. Their Lordships do not, therefore, consider that the Committee's finding can be interfered with.

The only other matter which Their Lordships desire to refer is the production of the Statutory Declaration. This document receives statutory sanction from the General Medical Council Disciplinary (Procedure) Rules, 1958. Rule 5 provides for the furnishing of a statutory declaration with a complaint and for its service on the practitioner against whom the complaint is made. This procedure was followed in the earlier stages of the present case. The statutory declaration, however, was not referred to at the hearing until a question arose as to the meaning of some of the appellant's statements attached to his letter of 23rd May, 1963. The Statutory Declaration was first mentioned by Counsel for the complainer. The primary purpose of the production of the Statutory Declaration appears to have been to explain the meaning of some of the appellant's statements. But thereafter at the invitation of the Legal Assessor the Statutory Declaration was circulated to the Committee and during an adjournment the Committee read the statutory declaration. The Legal Assessor then proceeded to ask Mrs. Forbes a series of questions arising out of the statutory declaration. If the appellant had been represented his counsel could, no doubt, have cross-examined Mrs. Forbes on her statutory declaration, but Their Lordships doubt the propriety of the Legal Assessor assuming the role of cross-examining counsel at that stage in the proceedings and referring to the statutory declaration. It was, no doubt, thought to be in the interests of the appellant that this course was taken. But it cannot be too strongly emphasised that this declaration can in no sense be described as evidence in the case unless and in so far as the witness assented to any of its terms. The statutory declaration contained a number of matters which were highly prejudicial to the appellant in particular some hearsay evidence as to his character. In the circumstances the statutory declaration having been produced it would have been desirable if the Committee had been warned by the Legal Assessor that the statutory declaration was not evidence and they must not consider it except for the limited purposes for which it had been used. In general Their Lordships consider it undesirable that any use should be made of a statutory declaration except in so far as it is made evidence by being made use of by the practitioner or his counsel. However, Their Lordships cannot say in the present case that the production of the statutory declaration was, in the whole, circumstances sufficient ground for invalidating the Committee's finding.

As already announced Their Lordships have advised Her Majesty that the appeal ought to be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Present : **Herat, J.**

T. S. L. M. JUNAID *vs.* INSPECTOR OF POLICE, AMBALANGODA

S.C. 749/1963—*M.C. Balapitiya, No.* 25722.

Argued and decided on : December 19, 1963.

Criminal Procedure Code, sections 148 (1) (*d*), 151 (2), 187 (1)—*Meaning of the word "forthwith" in section* 151 (2).

Held : That where an accused person is produced before a Magistrate otherwise than on summons or warrant, it is incumbent on the magistrate to examine on oath the person so producing him forthwith—i.e. on the same day. Failure to do so vitiates the subsequent proceedings.

Followed : *Issadeen* v. *I. P. Badulla*, (1963) LXV C.L.W. 18
Wadivelu v. *Kanagaratnam*, (1963) LXVI C.L.W. 16
Martin Appuhamy v. *Sub-Inspector of Police, Jaffna*, (1962) 64 N.L.R. 34; LXI C.L.W. 90
Mohideen v. *Inspector of Police, Pettah*, (1951) 59 N.L.R. 217; LV C.L.W. 12

Not Followed : *Aseerwatham* v. *Kandiah*, (1961) LXV C.L.W. 29
Amarasekera v. *Sub-Inspector of Police, Galenbindunuwewa*, (1963) LXVI C.L.W. 80

Nimal Senanayake with *M. T. M. Sivardeen*, for the 4th accused-appellant.

D. S. Wijesinghe, Crown Counsel, for the Attorney-General.

HERAT, J.

In this case eight accused persons were charged with committing offences of unlawful assembly and mischief and house trespass in the course of the unlawful assembly. They were convicted and the fourth accused-appellant has appealed and his appeal is argued by Mr. Nimal Senanayake. Mr. Senanayake submits that the first and second accused were produced in Court under section 148 (1) (*d*) of the Criminal Procedure Code by one Wanigasundera, Police Sergeant, on the 12th of December, 1958. Admittedly Police Sergeant Wanigasundera's evidence was not recorded on that date or on any subsequent dates. All the other accused surrendered to Court at various stages between the 13th of December, 1958, and the 16th of February, 1959. Admittedly none of these accused were brought before Court either by way of summons or warrant. On the 31st of March, 1959, the virtual complainant, namely, one Isadeen, was examined and his evidence recorded and the accused were thereafter charged. Now section 151 (2) of the Criminal Procedure Code states as follows :—

> "Where proceedings have been instituted under paragraph (d) of section 148 (1), the Magistrate shall forthwith examine on oath the person who has brought the accused before the court and any other person who may be present in court able to speak to the facts of the case."

Here Police Sergeant Wanigasundera was the person who brought the first and second accused before Court and he should have been forthwith examined on oath. This was never done. There was, therefore, a flagrant non-compliance with the provisions of section 151 (2) aforesaid. Section187 (1) of the Criminal Procedure Code reads thus :

> "Where the accused is brought before the court otherwise than on a summons or warrant the Magistrate shall after the examination directed by section 151 (2), if he is of opinion that there is sufficient ground for proceeding against the accused, frame a charge against the accused."

The other accused in this case, as I stated earlier, were all produced otherwise than on summons or warrant and, therefore, an examination directed by section 151 (2) should have been held. Section 151 (2) refers to the person producing the accused and any other person able to speak to the facts of the case. Here the person able to speak to the facts of the case was the virtual complainant Isadeen, but he was examined not forthwith as required by section 151 (2), that is, not on the days when the various accused appeared in Court but only on the 31st of March, 1959, which was six weeks after the last set of accused had surrendered to Court.

Therefore, in my opinion, there was also a flagrant non-compliance inasmuch the examination forthwith contemplated by section 151 (2) of the Criminal Procedure Code did not take place. I have in my judgment reported in 65 *Ceylon Law Weekly*, page 18, held that " forthwith " in the context of section 151 (2) of the Criminal Procedure Code means " at the time the person so producing the accused actually states to the Magistrate that he is producing ". I am glad to find that my brother, Mr. Justice Abeysundere, has come to the same view in a judgment delivered by him, in S.C. 35 /63,/M.C., N'Eliya, 24715—S.C. Minutes of 5th September, 1963.*

Learned Crown Counsel has very correctly and kindly referred me to a contrary view taken by my brother, Mr. Justice T. S. Fernando, in his judgment in S.C. 946/61/M.C. Jaffna, 21325—S.C. Minutes of 23rd November, 1961.† Unfortunately Mr. Justice Fernando does not give any detailed reasons for the view he has taken and with the greatest respect to so eminent a Judge I regret that I cannot differ from the view which I had formed in my judgment reported in 65, *Ceylon Law Weekly*, page 18. Moreover, this was a case, as Mr. Senanayake rightly points out, of unlawful assembly and in any event the failure to examine Sergeant Wanigasundera who produced the first and second accused is bound to vitiate the proceedings against the other accused also in a charge such as unlawful assembly. Even in the case of the examination of Isadeen the examination was not forthwith but a belated one made six months after the latest possible date. This Court has already held in the case reported in, 59 N.L.R., page 217 and 64 N.L.R., page 34, that a non-compliance of section 151 (2) read with section 187 (1) of the Criminal Procedure Code renders the proceedings bad. These cases have been followed on more than one occasion by this Court. Learned Crown Counsel has very helpfully brought to my notice a contrary view of Mr. Justice H. N. G. Fernando in S.C. 54/63/M.C., Anuradhapura, 26815—S.C. Minutes of 9th May, 1963.** But there again there is no detailed discussion of the reasoning which led Mr. Justice H. N. G. Fernando to take the view that the requirements of section 151 (2) were " technical " as he said. I regret that I cannot agree with that view.

In the circumstances the appeal of the fourth accused-appellant is allowed and his conviction is quashed and sentence is set aside and he is discharged. The 7th and 8th accused were discharged in the lower Court. As regards the 1st, 2nd, 3rd, 5th and 6th accused, although they have not appealed their convictions and sentences cannot stand for the aforesaid reasons. Now that this Court is aware of the matter I set aside their convictions and sentences by way of revision and discharge them.

Appeal allowed. Convictions of all accused quashed.

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

RAMASAMY & OTHERS *vs* SUB-INSPECTOR OF POLICE, AGRAPATANA

S.C. 777-779/'63—*M.C. Nuwara Eliya, Case No.* 25378.

Argued and decided on : June 12, 1964.

Criminal Procedure Code, sections 325 (1), 325 (2) *and proviso to* 347—*Magistrate recording, " I find the accused guilty ", or " I convict the accused " and thereafter dealing with accused under section* 325 (1)—*Legality thereof—Whether defect curable under section* 425.

Is it open to the Supreme Court, in appeal or by way of revision to make use of section 325 *without setting aside the conviction so entered ?*

Observations on the use of section 325.

At the end of a trial the Magistrate entered of record as follows :—" I find the 1st accused guilty on counts 1, 5 and 7. I find 2nd accused guilty on counts 2 and 4. I find the 3rd accused guilty on count 3. Reasons and sentences on 21st May, 1963 ".

* 66 C.L.W. 16 † 65 C.L.W. 29 ** 66 C.L.W. 80

After delivering his reasons for his order he recorded as follows :—" Without proceeding to conviction I discharge the accused conditionally under section 325 of the Criminal Procedure Code . . . "

Held : (1) That when the Magistrate entered of record, " I find the accused guilty ", he proceeded to convict the accused. Thereafter he was not entitled to say, " without proceeding to conviction ", and deal with the accused under section 325 of the Criminal Procedure Code. This would be not merely an irregularity but an illegality not curable under section 425 and any bond taken under it was not enforceable.

(2) That section 325 (2) is not applicable to cases in which a Magistrate, who is also a District Judge, assumes jurisdiction under section 152 (3) of the Criminal Procedure Code. In such cases the Magistrate has to act under section 325 (1).

(3) That it is not open to the Supreme Court, either in appeal or by way of revision to make use of section 325 without disturbing the conviction entered by the Magistrate.

Per SRI SKANDA RAJAH, J.—(A) "For the guidance of Magistrates I would make the observations that now follow. If an accused *pleads guilty* and the Magistrate proposes to deal with him under section 325, he will not proceed to say, ' I find the accused guilty on his own plea ', or ' I convict the accused on his own plea ', which are synonymous, as will be seen from some of the cases referred to later on in this order. This is also made quite clear in *Fernando* v. *Senaratne*, 48 N.L.R. 431 ".

(B)"If at the *end of the trial* he thinks that a charge has not been proved, he will say, 'I find the accused not guilty' or ' I acquit the accused '. But if he reaches the point when he thinks that ' the charge is proved ' he will stop at that stage if he proposes to deal with the accused under section 325 (1). He will not proceed further and say, ' I find the accused guilty ', or ' I convict him '."

(C)"It was argued by Mr. Pullenayagam that the Magistrate saying, 'I find the accused guilty', undoubtedly means that be has proceeded to conviction but that that is only an irregularity and not an illegality which would render the bond taken void. On the other hand, Mr. Rajaratnam argued that it was an illegality and not curable under section 425 of the Criminal Procedure Code and any bond taken in breach of that is an illegal bond and not enforceable. Mr. Rajaratnam also drew attention to the terms of the bond, viz., ' to appear for conviction and sentence '. I am inclined to agree with Mr. Rajaratnam's submission that such a bond cannot be enforced."

Cases referred to : *Fernando* v. *Senaratne*, (1947) 48 N.L.R. 431; XXV C.L.W. 61.
Madar Lebbe v. *Kiri Banda*, (1915) 18 N.L.R. 376; 1 C.W.R. 146.
The Attorney-General v. *Dissanayake*, (1953) 55 N.L.R. 100; XLIX C.L.W. 87
Perera v. *Punchiappuhamy*, (1944) 45 N.L.R. 21
Marthelis v. *Jamis*, (1929) 10 C.L. Rec. 36.
Fernando v. *Inspector of Police, Panadure*, (1948) 49 N.L.R. 333.
King v. *Ratnam*, (1928) 30 N.L.R. 212; 10 C.L. Rec. 10; 6 Times L.R. 81
Oaten v. *Auty*, (1919) 2 K.B. 278; 121 L.T. 215; 35 T.L.R. 441
Alwis v. *Fernando*, (1943) 44 N.L.R. 221; XXIV C.L.W. 135.
M. Isohamy v. *M. Haramanis*, (1963) 66 N.L.R. 57

T. W. Rajaratnam with *J. D. Aseervatham*, for the accused-appellants.

V. S. A. Pullenayagam, Crown Counsel, for the Attorney-General.

SRI SKANDA RAJAH, J.

This case, like several others which have come up before this Court, brings to light the difficulty experienced by Magistrates regarding the use of section 325 of the Criminal Procedure Code.

If I may say so with respect, even this Court when making use of this section, has sometimes made orders *per incuriam*, as will be seen from what follows.

Before referring to the relevant orders made by the Magistrate in this case, the following provisions of the Criminal Procedure Code may usefully be set down :—

' 325. (1) Where any person is charged before a Magistrate's Court with an offence punishable by such Court, *and the Court thinks that the charge is proved*, but is of opinion, that having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict an punishment or any other than a nominal punishment, or that it is expedient to discharge the offender conditionally as hereinafter provided, the *Court may, without proceeding to conviction*, either—

(*a*) order such offender to be discharged after such admonition as to the Court shall seem fit ; or

(*b*) discharge the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour, and *to appear for con-*

viction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order of the Court.

(2) Where any person has been *convicted on indictment* of any offence punishable with imprisonment, and the Court is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed it is inexpedient to inflict any punishment, or any other than a nominal punishment, or that it is expedient to discharge the offender conditionally as hereinafter provided, the Court may, in lieu of imposing a sentence of imprisonment, make an order discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour, and to appear for sentence when called on at any time during such period, not exceeding three years, as may be specified in the order."

" 347. At the hearing of the appeal the Court may if it considers that there is no sufficient ground for interference dismiss the appeal or may—

(*a*) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made or that the accused be re-tried or committed for trial as the case may be or find him guilty and pass sentence on him according to law ;

(*b*) in an appeal from a conviction—

(i) reverse the verdict and sentence and acquit or discharge the accused or order him to be re-tried by a Court of competent jurisdiction or committed for trial ; or

(ii) alter the verdict maintaining the sentence, or with or without altering the verdict increase or reduce the amount of the sentence or the nature thereof ;

(*c*) in an appeal from any other order, alter or reverse such order :

Provided always that the sentence awarded on an appeal shall not exceed the sentence which might have been awarded be the Court of first instance."

(For brevity these and other sections of the Criminal Procedure Code will hereinafter be referred to without the words " of the Criminal Procedure Code ").

At the end of the trial the Magistrate entered of record in the journal entry of 9th August, 1963. " I find the first accused guilty on counts 1, 5 and 7. I find the second accused guilty on counts 2 and 4. I find the third accused guilty on count 3. Reasons and sentence on 21st August, 1963 ".

On 22nd August, 1963, the Magistrate in pronouncing the reasons repeated the above, *i.e.*, he said again that he found the 1st, 2nd and 3rd accused guilty of the counts set out above.

The journal entry of 22nd August, 1963, reads, " I deliver reasons for my order in the presence of the accused. Without proceeding to conviction I discharge the accused conditionally under section 325 of the Criminal Procedure Code . . . ".

When the Magistrate entered of record, " I find the accused guilty ". he proceeded to convict the accused. Thereafter, he was not entitled to say " without proceeding to conviction ". It was not competent to him to vacate the conviction he had already entered.

For the guidance of Magistrates I would make the observations that now follow. If an accused *pleads guilty* and the Magistrate proposes to deal with him under section 325, he will not proceed to say " I find the accused guilty on his own plea " or " I convict the accused on his own plea ", which are synonymous, as will be seen from some of the cases referred to later on in this order. This is also made quite clear in *Fernando* v. *Senaratne*, 48 N.L.R. 431. In that case the accused pleaded guilty and the Magistrate recorded, " I find the accused guilty " and Dias, J., held that this amounted to a conviction of the accused and the Magistrate could not, therefore, act under the provisions of section 325 (1) of the Criminal Procedure Code. It was his duty in the circumstances to have imposed a sentence according to law.

Once he says either of the above, he will have " proceeded to conviction ". He will not say either of the above but merely say " without proceeding to conviction ".

If at the *end of a trial* he thinks that a charge has not been proved, he will say, " I find the accused not guilty " or " I acquit the accused ". But if he reaches the point when he thinks that " the charge is proved " he will stop at that stage if he proposes to deal with the accused under section 325(1). He will not proceed further and say, " I find the accused guilty ", or " I convict him ". In short, thinking that the charge is proved is a stage anterior to proceeding to conviction. It is at the earlier stage that section 325 (1) can be made use of ; not after proceeding beyond that stage. (*Vide* also S.C. Minutes of 16th January, 1964, in S.C. 820/63 with application, No. 522/63, M.C. Colombo, Case No. 32350/B). If, however, he proceeds to the next stage he is compelled by law to pass sentence according to law as indicated by Dias, J., in the

48 N.L.R. case (*supra*). These two stages are made sufficiently clear by section 325 (1) itself.

It was argued by Mr. Pullenayagam that the Magistrate saying, " I find the accused guilty ", undoubtedly means that he has proceeded to conviction but that that is only an irregularity and not an illegality which would render the bond taken void. On the other hand, Mr. Rajaratnam argued that it was an illegality and not curable under section 425 of the Criminal Procedure Code and any bond taken in breach of that is an illegal bond and not enforceable. Mr. Rajaratnam also drew attention to the terms of the bond, viz., " to appear for conviction and sentence ". I am inclined to agree with Mr. Rajaratnam's submission that such a bond cannot be enforced.

Section 325 (2) applies after conviction *on indictment*. A District Judge trying an accused on an indictment can make use of section 325 (2) after conviction. The Supreme Court, too, in its original jurisdiction can make use of section 325 (2) after conviction. Section 325 (2) is not applicable to cases in which the Magistrate who is also a District Judge, assumes jurisdiction under section 152 (3) ; for he is not trying such cases " on indictment ". When a Magistrate who is also a District Judge exercises the punitive powers conferred upon him by section 152 (3) he still acts as Magistrate and not as District Judge. *Madar Lebbe* v. *Kiri Banda*, (1915) 18 N.L.R. 376 (Full Bench). In such cases the Magistrate has to act under section 325 (1) and not under section 325 (2). This view is supported by the judgment of Wijeyawardena, J. (reproduced in Appendix IV and referred to in Appendix II—Application No. 284, M.C. Gampaha, 16751, S.C. Minutes of 2nd August, 1943).

If it is not open to the Magistrate to proceed to conviction and then make use of section 325 (1) is it open to this Court, either in appeal or by way of revision, to make use of section 325 (1) without disturbing the conviction entered by the Magistrate ?

In S.C. 354, M.C. Gampaha, case No. 16264, S.C. Minutes of 9th July, 1943, Moseley, S.P.J., made the order reproduced in Appendix I. That was a case in which the Magistrate assumed jurisdiction under section 152 (3) and convicted the accused and imposed a fine. The order of this Court which purported to be made under section 325 (2) without disturbing the conviction required the accused to enter into a bond to be of good behaviour and certified its order to the Magistrate, Gampaha, and the Magistrate carried out the order of this Court as he was bound to under section 350, regardless of whether this order was according to law or not. In the words of Nagalingam, S.P.J., in *The Attorney-General* v. *Dissanayake*, 55 N.L.R. 100, at 102, " . . . all that he (Magistrate) had to do *at that stage* was to carry out the orders of this Court on the unquestionable basis that the order of this Court is right ", *i.e.*, act in a ministerial capacity. The Magistrate accordingly took the bond for two years. Once the Magistrate carried out the order he was *functus officio* and his " ministerial office " in respect of that case came to an end.

But, before the expiry of the period of two years (in the Gampaha case) the accused, Jayasundera, was convicted of another offence and the Police moved that " the bond be forfeited and a sentence be passed on the accused ". That application was opposed by the accused and his surety, the matter was fully argued by Counsel and the Magistrate held that the bond could not be enforced as it was invalid (Appendix II reproduces the Magistrate's order). After making that order the Magistrate advised the Police to consult the Attorney-General and have it vacated in the event of it being wrong. Though the Police moved the Attorney-General, no steps were taken probably because it appeared to the Attorney-General that the order of the Magistrate was right.

It will be seen that when an application is made to the Magistrate to enforce the bond he is called upon to deal with the application in his judicial capacity and not in a ministerial capacity which came to an end as soon as the bond was taken. Therefore, he has first to decide whether the bond is valid before he can decide to enforce it ; for, a bond should be valid before it can be enforced. This aspect of the matter does not appear to have been considered by Nagalingam, S.P.J., in the 55 N.L.R. case (*supra*), which will be considered presently in some detail.

The next case in which this Court made order *per incuriam* in making use of section 325 was *Perera* v. *Punchiappuhamy*, 45 N.L.R. 214, which would be discussed below.

The then Chief Magistrate of Colombo in case No. 25777 convicted the accused, Dissanayake, of voluntarily causing hurt to his wife with an iron rod (section 314 of the Penal Code) and sentenced him to three months' rigorous imprisonment. In

appeal, Rose, C.J., while affirming the conviction ordered the accused to enter into a bond to be of good behaviour for 12 months. (Appendix III where the judgment is reproduced). This order was certified under section 350 and the Chief Magistrate, who had earlier dealt with the Gampaha case (*supra*), took the bond on 19th February, 1953, as directed by this Court. On 5th May, 1953, the Police brought to the notice of the Chief Magistrate that the accused, Dissanayake, had been convicted of another offence after he entered into the bond and moved that the respondent be called upon to show cause why " he should not be convicted and sentenced in this case " (25777).

The Chief Magistrate, who had nine years earlier as Magistrate, Gampaha, made order (set out in Appendix II) after full argument, had no reason to think that the law would have changed with the change of Attorney-General and made an order similar to the earlier order.

Thereupon, the Attorney-General moved this Court by way of revision and it was dealt with by Nagalingam, S.P.J., who after certain remarks about the conduct of the Chief Magistrate went on to hold that although a Magistrate cannot make use of section 325 if he proceeds to conviction, it is open to this Court to do so without disturbing the conviction. Mr. Pullenayagam, quite properly submitted that this view was not correct.

In doing so Nagalingam, S.P.J., relied on the cases of *Perera* v. *Punchiappuhamy*, 45 N.L.R. 214 (*supra*) ; *Marthelis* v. *Jamis*, 10 C.L. Rec. 36 ; *Fernando* v. *Inspector of Police, Panadure*, 49 N.L.R. 333. But he did not consider the effect of the proviso to section 347. It is difficult to conceive that the eminent Counsel who argued the matter would have failed to draw the learned Judge's attention to this proviso, which restricts the punitive powers of the Court of Appeal.

If I may say so with respect, perusal of the judgment gives one the impression that the learned Judge was so carried away by his feeling in regard to what he thought was improper conduct on the part of the Chief Magistrate in considering whether the bond taken in pursuance of the order of this Court (Appendix III) was enforceable and went to the extent of thinking that the " Chief Magistrate regarded himself an appellate tribunal possessing powers on a par with those of the Privy Council " (55 N.L.R., at 102) that he did not pause to examine the 45 N.L.R., 10 C.L. Rec., and 49 N.L.R. cases (*supra*).

It is competent to an original Court to decide on the validity or otherwise of a decree in appeal if such a question arose (*vide* 439 (F)/61—D.C. Panadure, 5197, S.C. Minutes of 4th December, 1963).* It is fallacious to think that in doing so the original Court was usurping the powers of the Privy Council.

It may be mentioned that Basnayake, J., pointed out in 49 N.L.R. 333 (*supra*) that conviction within the meaning of section 325 means a verdict of guilt. In doing so he relied on the cases of *King* v. *Ratnam*, 30 N.L.R. 212 and *Oaten* v. *Auty*, (1919) 2 K.B. 278. He then proceeded to delete the offending words, " I find the accused guilty " from the order and substituted therefor the words " I find the charge proved ". In short, Basnayake, J., set aside the conviction in order to make use of section 325 (1). Though Nagalingam, S.P.J., relied on this case in support of his view, his attention does not appear to have been drawn to the course adopted by Basnayake, J. The 49 N.L.R. case (*supra*) far from supporting his view supported the view that the Court of Appeal cannot make use of section 325 without disturbing the conviction. So does the 10 C.L. Rec. case (*supra*) which will be considered presently.

In 45 N.L.R. (*supra*) at 215, *Perera* v. *Punchiappuhamy*, Soertsz, J., expressed his view as follows —" when this Court acts under Chapter 26 (*i.e.*, 325 (1)) it must leave the verdict as it stands, for, a *verdict of guilty*, that is to say, that a charge has been proved is the foundation for the application of Chapter 26 but it alters the nature of the sentence or punishment ". From this passage it is clear that the learned Judge was of opinion that this Court can make use of section 325 (1) only when it holds that the charges has been proved. But, if I may say so with great respect, the learned and eminent judge acted *per incuriam* in treating the " verdict of guilty " as synonymous with, " the charge has been proved ". His attention does not appear to have been drawn to the case of *Marthelis* v. *Jamis* (*supra*) where Akbar, J., stated, " this is an appeal by an accused from a conviction from the verdict of the Magistrate whose verdict is as follows : ' I find the accused guilty ; reasons later. I deal with him under section 325 '," and ended at page 37 " the verdict of conviction must be deleted . . . " Nor was his attention drawn to the earlier decisions of

Garvin, J., in *King* v. *Ratnam* (*supra*). He, however, referred to the case, *Alwis* v. *Fernando*, 44 N.L.R. 221, where Wijeyawardena, J., set aside the conviction *pro forma* in order to make use of section 325 (1).

Besides, the proviso to section 347 limits the punitive powers of this Court in appeal from the Magistrate's Court (and in revision) to those of the Magistrate, *e.g.*, the maximum sentence of imprisonment a Magistrate can impose in respect of an offence of voluntarily causing hurt (314 of the Penal Code) an offence punishable with imprisonment for one year, is six months. In view of this proviso it is not competent to this Court in dealing with an appeal from a Magistrate's Court to impose a sentence of imprisonment exceeding six months.

A priori, if the Magistrate cannot make use of section 325 after proceeding to conviction, then, this Court, too, cannot lawfully do so.

If Rose, C.J., was of opinion that his judgment (Appendix II) was not made *per incuriam* and his opinion was further strengthened by the opinion of Nagalingam, S.P.J., it is not likely that only 15 days after the 55 N.L.R. case was decided he would have set aside the conviction in order to make use of section 325 (1), as he did in a case from the Magistrate's Court of Vavuniya (*vide* Appendix V). For these reasons, I would answer the question formulated in the negative.

The convictions in this case were set aside by this Court on 24th January, 1964.

I would hold that the charges in respect of which the Magistrate purported to convict the accused have been proved and without proceeding to conviction I would order each of the accused to enter into a recognizance in a sum of Rs. 100/100 with one surety each in a like sum to be of good behaviour and appear for conviction and sentence when called upon at any time within six months. The order for payment of compensation and Crown costs made by the Magistrate on 22nd August, 1963, will stand. If compensation is not paid, it will be recoverable as a fine. If the accused fail to enter into the bonds as indicated now, after they have been duly served with notice, then the record will be forwarded to this Court for further action.

Accused bound over.

APPENDIX I

Present : **Moseley, S.P.J.**

S.C. No. 354—*M.C. Gampaha, No.* 16263.

Argued and decided on : 9th July, 1943.

R. L. Pereira, K.C., with *S. W. Jayasooriya*, for accused-appellant.

MOSELEY, S.P.J.

The evidence in this case discloses what I may call a technical theft and I do not propose to disturb the conviction. The appellant was ordered to pay a fine of Rs. 100/-. In view of what I have already said it seems to me that an order under section 325 (2) would meet the case.

I, therefore, set aside the sentence of fine of Rs. 100/- and order the offender to enter into his own recognizance in a sum of Rs. 100/- with one surety in a like sum to be of good behaviour and appear for sentence when called upon at any time during the next two years.

Sgd. F. A. MOSELEY
Senior Puisne Justice.

APPENDIX II

27.3.44—*M.C. Gampaha*, 16263.

ORDER

In this case the accused was charged with an indictable offence, viz., of theft of three buffalos valued at Rs. 240/-. I decided to exercise jurisdiction under section 152 (3), Cap. 16. After trial the accused was convicted and sentenced to pay a fine of Rs. 10/-. He appealed and the following order was passed by the Appeal Court :—

" The evidence in this case discloses what I may call a technical theft and *I do not propose to disturb the conviction.* The appellant was ordered to pay a fine of Rs. 100/-. In view of what I have already said it seems to me that *an order under section* 325 (2) would meet the case.

I, therefore, *set aside the sentence* of the fine of Rs. 100/- and order the offender to enter into his own recognizance in a sum of Rs. 100/- with one surety in a like sum to be of good behaviour and appear for sentence when called upon at any time during the next two years." (Moseley, S.P.J.).

This decision was on 9th July, 1943. On receipt of the record in this Court the accused was noticed to appear in Court and on 5th August, 1943, he entered into the bond as directed in the above order of the Appeal Court.

On 2nd March, 1944, *i.e.*, well within the period of two years, the accused was convicted of criminal breach of trust and sentenced to pay a fine of Rs. 25/-. The accused has not appealed and that conviction stands. Therefore, the Police now make an application to forfeit the bond which the accused entered into in this case and to pass sentence on the accused.

The accused and his surety resist this application on the ground that the order made by the Appeal Court is of no force or avail in law.

When a Magistrate who is also District Judge assumes jurisdiction under section 152 (3), Cap. 16, he still acts as Magistrate and not as District Judge ; *Madar Lebbe* v. *Kiri Banda*, (1915) (Full Bench) : 18 N.L.R. 276, *v.* also 1 C.W.R. 93.

That is to say a Magistrate exercising jurisdiction under section 152 (3), Cap. 16, should act under section 325 (1), Cap. 16, if he elects to make use of section 325, Cap. 16. He should not and cannot lawfully make use of section 325 (2), Cap. 16.

The following are the relevant words of section 325 (2) : " where any person has been convicted *on indictment* of any offence . . . ".

This accused was not tried " *on indictment* ". Therefore, the Magistrate could not have made use of section 325 (2), Cap. 16. He could have used section 325 (1), Cap. 16, only. That is to say, he should not proceed to conviction if he chooses to use section 325, Cap. 16.

The proviso to section 347, Cap. 16, appears to indicate that the Appeal Court can only make an order which can lawfully be made by the original Court. So that if a Magistrate assuming jurisdiction under section 152 (3) cannot lawfully make an order under section 325 (2), then, if I may say so with the greatest respect, the Appeal Court, too, cannot make an order under section 325 (2) in a such case.

This view derives support from the order made by Wijeyewardene, J., in the case of *M. M. Menon, S.I. Police, C.I.D., (complainant)* v. *H. P. Don Jirasena Gunawardena*, M.C. Gampaha, 16751, (1943) which was brought before the S.C. by way of revision (*V.* S.C. 284 (Revision) of 1943). In this case the acting Magistrate assumed jurisdiction under section 152 (3), Cap. 15, in a case of forgery and convicted the accused and sentenced him to pay a fine. The Attorney-General moved the S.C. by way of revision to have a sentence of imprisonment passed on the accused. Wijeyewardene, J., made order *setting aside the conviction* and discharging the accused conditionally on his entering into a recognizance with a surety to be of good behaviour.*

For these reasons it seems to me that the order made in appeal in this case was made *per incuriam*. I say so with the greatest respect.

That being so I regret that I am unable to forfeit the bond or to pass sentence on the accused.

Sgd. P. Sri Skanda Rajah
Magistrate & A.D.J.
27-3-44

27.3.44.
Order delivered in open Court.

Intd....
A.D.J.
27-3-44

APPENDIX III

Present : **Rose, C.J.**

S.C. No. 429—*M.C. Colombo, No.* 25777.

Argued and decided on : 22nd January, 1963.

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

Ananda Pereira, C.C., for the Attorney-General.

* This judgment is reproduced in Appendix IV (*infra*).

ROSE, C.J.

In this case the appellant was convicted of what the Magistrate describes as a brutal assault on his wife. No argument has been addressed to me on the actual facts of the offence which are, of course, amply proved. The conviction is, therefore, affirmed. The question of sente..ce is difficult. The Magistrate passed a sentence of three months' rigorous imprisonment on each count to run concurrently, and dealing with the sentence in the abstract it is impossible for me to say that that sentence is excessive. There are, however, the special circumstances in this case that the parties are husband and wife and that I am informed that they are now living together and that there are children of the marriage. The appellant has no previous convictions and I feel that from the point of view of both parties justice will be done if a sentence of imprisonment is not imposed. The accused will be bound over in the sum of Rs. 500/- in his own recognizances to be of good behaviour for a period of twelve months.

Sgd. ALAN ROSE
Chief Justice

APPENDIX IV

Application in Revision in M.C. Gampaha, No. 16751 (284).

Present : **Wijeyewardene, J.**

Argued and decided on : 2nd August, 1943.

E. H. T. Gunasekera, C.C., for the Attorney-General.

H. V. Perera, Q.C., with *Dodwell Gunawardena*, for accused-respondent.

WIJEYEWARDENE, J.

The Attorney-General has made the present application as on the conviction of the accused under section 457, a sentence of imprisonment should have been passed. The Magistrate has imposed only a fine. I have considered the case carefully and I feel that this is a case in which the Magistrate should have dealt with the accused under section 325 of the Criminal Procedure Code, without proceeding to conviction. Most probably he would have acted under that section if his attention was directed to it, as his judgment shows that he thought the offence " savoured of a schoolboy prank ".

I would set aside the conviction and discharge the accused conditionally on his entering into a recognizance with a surety in a sum of Rs. 50/- to be of good behaviour of three months.

Sgd. E. A. L. WIJEYEWARDENE
Puisne Justice

APPENDIX V

Present : **Rose, C.J.**

S.C. No. 764—*M.C. Vavuniya, No.* 25540.

Argued and decided on : 29th October, 1953.

M. M. Kumarakulasingham with *T. W. Rajaratnam*, for the accused-appellant.

Ananda Pereira, C.C., for the Attorney-General.

ROSE, C.J.

The learned Magistrate was undoubtedly correct in taking the view that an offence against section 354 of the Penal Code had been committed by the appellant. I am, however, informed from the Bar, and learned Crown Counsel concedes, that the young man, the appellant, who is 22 years of age, and the girl, who at the time of the offence was 15 years and 10 months and is now 17 years of age, are, in fact, living together as husband and wife. In these circumstances I do not think that any public or private good is caused by sending this young man to prison, nor do I feel that it is an appropriate case for him to be bound over under section 325 of the Criminal Procedure Code. I feel that although one may perhaps be erring on the side of lenience that an appropriate order is that the conviction should be *pro forma* set aside and that the appellant should be warned and discharged under section 325 (1) (*a*) of the Criminal Procedure Code.

Sgd. ALAN ROSE
Chief Justice

Present : **Basnayake, C.J., and Herat, J.**

HANWELLE PIYARATANA THERA
vs.
KANUMALE JINANANDA THERA & ANOTHER

S.C. No. 569/'60 (*F*)—*D.C. Kurunegala, No.* 8852.

Argued on : May 20 and June, 18, 1963.
Decided on : June 18, 1963.

Buddhist Temporalities Ordinance (*Cap.* 318), *section* 23—*Property purchased by deceased monk in his name—Claim that it is property of the temple to which he belonged—What is necessary to be proved.*

Held : That to succeed in a claim under section 23 of the Buddhist Temporalities Ordinance, viz, that a property purchased by a deceased Buddhist monk, but not alienated during his life, is the property of the temple to which he belonged, it must be established that it is *pudgalika* property acquired by the deceased for his exclusive personal use.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke* and *L. C. Seneviratne*, for the defendant-appellant.

C. R. Gunaratne with *G. G. Mendis*, for the plaintiff-respondent.

BASNAYAKE, C.J.

This is an action by Kanumale Jinananda Thera, the controlling Viharadhipathi of the Bulupitiya Vihara, against Jayaweera Mudiyanselage Kiri Mudiyanse of Bulupitiya and Hanwelle Piyaratana Thera of Hanwella Temple in Devamedi Udukaha Korale. The plaintiff in his final plaint, dated 7th May, 1959, states that Bulupitiya Vihara is a temple exempted from the operation of the provisions of section 4 (1) of the Buddhist Temporalities Ordinance of 1931, and that he is the controlling Viharadhipathi of that Vihara by virtue of a decree, dated 24th August, 1951, in the District Court of Kurunegala, case No. 6582. He now asks that the three lands referred to in the schedule to the plaint be declared the property of Bulupitiya Vihara and that the defendants be ejected therefrom and for damages.

These lands were purchased on 20th January, 1904, on deed No. 19980 (P 1) attested by Notary, Madawala Ratnayake Mudiyanselage Ranhamy. By that deed Nettipalagedera Sonuthara Thera of Ratmale Temple and his brothers, Mapa Mudiyanselage Mudalihamy, Ausadahamy and Hetuhamy, sold for Rs. 300/- to Niyangoda Seelaratana Thera of Bulupitiya Temple the land described therein as—

> " All that Pillewa now garden only, in extent of one lahas of kurakkan sowing together with the plantations thereon, excluding its adjoining field called Kudawewe Kumbura of three pelas of paddy sowing extent situated at Bulupitiya in the aforesaid Korale and bounded together on the East by Pansalwatta on the South by Pillewa and field of Ranmenika on the West by Pinkumbura and Badewetiya to the land and on the North by hena belonging to Appuhamy."

The plaintiff relies on section 23 of the Buddhist Temporalities Ordinance and claims that by virtue of that enactment property purchased on P 1 should go to the Bulupitiya Vihara. Section 23 reads—

> " All *pudgalika* property that is acquired by any individual *bhikkhu* for his exclusive personal use, shall, if not alienated by such *bhikkhu* during his life-time, be deemed to be the property of the temple to which such *bhikkhu* belonged unless such property had been inherited by such *bhikkhu*."

* For Sinhala translation, see Sinhala section, Vol. 8 part 3, p. 17

There is no evidence that this property was acquired for the exclusive personal use of Seelaratana Thera whose pupil is the 2nd defendant-appellant. So that the question of the application of the section does not arise as the plaintiff is not entitled to call in aid that section unless he can establish that the property is *pudgalika* property acquired by the deceased for his exclusive personal use. The plaintiff has failed to establish that this property was acquired for the exclusive personal use of Seelaratana Thera. There is also no evidence of dedication. The learned District Judge was wrong in giving judgment for the plaintiff. We therefore allow the appeal and dismiss the plaintiff's action with costs.

HERAT, J.

I agree.

Appeal allowed.

Present : **Basnayake, C.J., and H. N. G. Fernando, J.**

ASIAUMMAH & OTHERS *vs.* MOHAMADU ZAIN*

S.C. No. 16—*D.C. Batticaloa, No. L* 1344.

Argued and decided on : March 17, 1961.

Civil Procedure Code, section 18—*Addition of party as defendant—Requirement that Court should set out ground on which order adding party is made.*

Held : That when a Judge makes order adding a party as defendant he should comply with section 18 (2) of the Civil Procedure Code which requires that every order for such addition should state the facts and reasons which together form the ground on which the order is made.

H. W. Jayewardene, Q.C., with *C. Shanmuganayagam*, for the 1st and 2nd defendants-appellants.

C. Ranganathan, for the plaintiff-respondent.

BASNAYAKE, C.J.

This is an appeal from the order of the District Judge directing that Mohamed Zain Marianachchi be added as a defendant. This action commenced on 17th June, 1957. On 2nd April, 1958, the plaintiff's proctor applied for a notice on her to shew cause why she should not be added as " an added defendant ". Notice was issued on her and was served on her after several attempts. The matter finally came up for inquiry on 22nd January, 1959. On that day Marianachchi's proctor informed the Court that she had no objection to being added as a party. Counsel for 1st—5th defendants objected. Without giving any reasons therefore the learned District Judge made order " The application is allowed. Add Mohamed Zain Marianachchi as added defendant. Amended plaint for 24th February, 1959 ". Learned counsel for the appellants submits that the learned trial Judge has not complied with the requirements of section 18 of the Civil Procedure Code. Sub-section (2) of section 18 which empowers the Court to add a party defendant requires that every order for such addition should state the facts and reasons which together form the ground on which the order is made. The learned Judge has not complied with that requirement.

We, therefore, set aside the order of the learned District Judge and send the case back to the lower Court for an inquiry to be held *de novo* on the application made by the plaintiff to have the party in question added as a defendant. The costs of the appeal will abide the final result of the case.

H. N. G. FERNANDO. J.

I agree.

Set aside and sent back.

* For Sinhala translation see Sinhala section Vol. 8, part 5, p. 18

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

F. M. AMARASEKERA *vs.* SUB-INSPECTOR OF POLICE, GALENBINDUNUWEWA

S.C. No. 54/'63—*M.C. Anuradhapura, No.* 26815.

Argued and decided : 9th May, 1963.

Criminal Procedure Code, section 151 (2)—*Whether Police officer producing accused in Court should be examined—Not an imperative provision of law.*

Held : That in a case to which section 151 (2) of the Criminal Procedure Code applies, if the virtual complainant is examined and speaks to facts upon which a Magistrate can decide that a charge should be framed, it would be merely a technical requirement that in addition the officer producing the accused should also be examined. There is no imperative provision of law requiring such officer to be examined by the Magistrate.

Followed : *Aseervatham* v. *Kandiah*, (1961) LXV C.L.W. 29.

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

G. P. S. de Silva, Crown Counsel, for the Attorney-General.

H. N. G. FERNANDO, J.

The only question argued by counsel for the appellant is whether there should have been compliance with the provisions of section 151 (2) of the Criminal Procedure Code with regard to the examination of the person by whom the accused was produced before Court. The charge was, in fact, framed by the learned Magistrate after the examination of the virtual complainant. But he did not at that stage examine the Police Officer who produced the accused. Counsel has very properly referred me to the unreported Judgment of my brother, Fernando, in S.C. No. 946/'61, (M.C. Jaffna, Case No. 21325), delivered on 23rd November, 1961,* where in similar circumstances it was held that there is no imperative provision of law requiring the Magistrate to examine the Police Officer who brings the accused before a Court. If the virtual complainant is examined and speaks to facts upon which a Magistrate can decide that a charge should be framed it would, in my opinion, be merely a technical requirement that in addition the officer producing the accused should also be examined. I am accordingly in agreement with the judgment cited.

The appeal is dismissed. But in computing the length of the sentence a period of four months, from January to April, 1963, during which the accused has been on remand will be taken into account.

Appeal dismissed.

*65 C.L.W. 29.

Privy Council Appeal, No. 24 *of* 1963.

Present : **The Lord Chancellor, Viscount Radcliffe, Lord Morris of Borth-Y-Gest, Lord Hodson, Lord Pearce.**

THE QUEEN *vs.* MURUGAN RAMASAMY *alias* BABUN RAMASAMY

From
THE COURT OF CRIMINAL APPEAL, CEYLON.

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

DELIVERED THE 21ST JULY, 1964.

Evidence Ordinance, section 27*—Criminal Procedure Code, section* 122 (3)*—Does the latter section override the provisions of the former ?—The relation between the two sections—Application of maxim " Generalia specialibus non derogant "—Validity of decision in Rex* v. *Jinadasa,* 51 *N.L.R.* 529.

The respondent was tried and convicted in the S.C. on a charge of shooting one Piyadasa with a gun with such intention or knowledge as would have resulted in murder, if Piyadasa had died, under section 300 of the Penal Code. In addition to other witnesses, a Police Sergeant, *J.*, was called by the prosecution for the purpose of deposing to a statement made by the respondent in consequence of which a gun capable of causing the injury actually inflicted had been discovered. At the time of making the statement in the course of a Police investigation under section 122 of the Criminal Procedure Code the respondent was undisputedly in the custody of the Police.

At the trial, in the absence of the jury, the prosecuting counsel told the Judge, who had the written record of the statement before him, that he proposed to " lead in certain portions of the statement made by the accused in consequence of which the gun was discovered ". The jury was recalled, and the portion of the accused's statement, which read, " I am prepared to point out the place where the gun and the cartridges were buried " was put before them. Sergeant *J.* was cross-examined on this statement by defence counsel. The respondent did not give evidence.

In his summing up to the jury, with regard to the evidence of Sergeant *J.* as to the finding of the gun, the Judge directed them that it meant nothing more than that the accused was aware of where a gun and cartridges were buried, not necessarily buried by him.

The jury returned an unanimous verdict of guilt and the respondent was sentenced to ten years' rigorous imprisonment. His appeal against conviction and sentence was allowed by the Court of Criminal Appeal on the ground that *J's.* evidence as to the information leading to the discovery of the gun and cartridges was improperly admitted, since section 27 of the Evidence Ordinance did not permit the giving of evidence that was covered by section 122 (3) of the Criminal Procedure Code.

Held : (*a*) That section 122 (3) of the Criminal Procedure Code bars oral evidence as well as written records, and it extends to accused persons as much as to any other witness. (*R.* v. *Jinadasa,* (1950) 51 N.L.R. 529, overruled ; *R.* v. *Buddharakkita Thera,* 63 N.L.R. 433, followed).

(*b*) That, applying the maxim of interpretation *generalia specialibus non derogant,* section 27 of the Evidence Ordinance was the particular enactment, while section 122 (3) of the Criminal Procedure Code was a general provision, and, therefore, evidence falling within section 27 can lawfully be given at a trial, even though it would otherwise be excluded as a statement made in the course of an investigation under section 122. (*R.* v. *Don Wilbert,* 64 N.L.R. 83, referred to).

(*c*) That the rule in section 27 limits the admissible words, whether they amount to a confession or not to those relating distinctly to the fact discovered, and the Judge is not at liberty to go beyond that limit, however much the prosecution may wish to do so, and even though it may result in the exclusion of self-exculpatory statements.

(*d*) That the summing-up by the Judge in this case was such that it could not fairly be said that any injustice was caused to the defence by the words of the statement that were admitted under the rule in section 27, being admitted in the limited form chosen by the Judge.

Per THE JUDICIAL COMMITTEE :—" The question is, of course, a difficult one ; but Their Lordships are of opinion that the correct way to solve it is by applying the maxim of interpretation " *generalia specialibus non derogant* ". On the one hand, there is the Evidence Ordinance containing a precise and detailed codification of the rules that are intended to govern the admission and rejection of evidence. Among them is this section 27, a well-known rule, which has always been regarded as removing all objections to the statements that it deals with, so far as those objections rest upon misgivings as to the conditions under which such statements have been made. On the other hand, there is the Criminal Procedure Code not primarily concerned with rules of evidence at all but containing regulations for the special procedure of investigation under Chapter XII and manifesting a clear general intention based on the peculiarities of the procedure, to keep material produced by it out of the range of evidence to be used when a trial takes place. Their Lordships think that they must accept the conclusion that evidence falling within section 27 can lawfully be given at a trial, even though it would otherwise be excluded as a statement made in the course of an investigation under section 122."

Overruled : *R.* v. *Jinadasa*, (1950) 51 N.L.R. 529.

Cases referred to : *R.* v. *Warickshall*, (1783) 1 Leach 263.
R. v. *Butcher*, (1798) 1 Leach 265n.
Thurtell v. *Hunt*, (1825) Notable British Trials, p. 145.
Pakala Narayana Swami v. *Emperor*, (1939) A.I.R. (P.C.) 47.
Biram Sardar v. *Emperor*, (1941) A.I.R., Bombay 146.
R. v. *Pabilis*, (1924) 25 N.L.R. 424.
R. v. *Gabriel*, (1937) 39 N.L.R. 38.
R. v. *De Silva*, (1940) 42 N.L.R. 57 ; XVIII C.L.W. 125.
R. v. *Haramanisa*, (1944) 45 N.L.R. 532 ; XXVIII C.L.W. 68.
Reg. v. *Buddharakkita Thera*, (1962) 63 N.L.R. 433.
Reg. v. *Don Wilbert*, (1962) 64 N.L.R. 83.

Texts cited : *Sarkar on Evidence* (6th Ed., 1939) 246.
Woodroffe & Ameer Ali—Law of Evidence (9th Ed., 1931) 292.

The judgment of the Court of Criminal Appeal is reported in LXIII C.L.W. 26

Dingle Foot, Q.C., with *R. K. Handoo*, *Ralph Milner*, *V. S. A. Pullenayagam* and *V. C. Gunatilaka*, for the Crown-appellant.

E. F. N. Gratiaen, Q.C., with *John A. Baker*, for the respondent.

VISCOUNT RADCLIFFE

The main question raised by this appeal is an important and difficult one relating to the administration of the criminal law of Ceylon. It concerns the relationship between section 27 of the Evidence Ordinance (the section which permits the giving of evidence at a criminal trial as to information provided by an accused person, if the information has led to the discovery of some relevant fact) and section 122 (3) of the Code of Criminal Procedure (which strictly limits the use that may be made of statements made by a person to a police officer in the course of an investigation set on foot under Chapter XII of the Code, the chapter in which section 122 appears). The respondent was tried and convicted in the Supreme Court on a charge of shooting one Piyadasa with a gun with such intention and knowledge, to put it briefly, as would have resulted in murder if Piyadasa had died, and at his trial certain evidence was admitted by the presiding Judge to the effect that a gun capable of causing the injury actually inflicted had been discovered in consequence of information of its whereabouts which he had given to a police officer in the course of a section 122 investigation. On the 17th December, 1962, the Court of Criminal Appeal quashed his conviction and directed an acquittal, holding that the evidence of his statement to the police officer had been improperly admitted, that this had vitiated the jury's verdict at his trial, and that the case was not one in which it would be right for the Court to exercise its power under section 5 of the Court of Criminal Appeal Ordinance to dismiss the appeal on the ground that no substantial miscarriage of justice had actually occurred.

By special leave the appellant has appealed to this Board against the decision of the Court of Criminal Appeal. The appeal has been rested in argument on several independent grounds, which Their Lordships will notice in due course. But, since the important point of principle is that which relates to the admission of the evidence of the information leading to the discovery of the gun,

Their Lordships will proceed in the first place to express their opinion on that issue. It will be convenient, in doing so, to consider the relationship between section 27 of the Evidence Ordinance and section 122 (3) of the Criminal Procedure Code without making any further introduction to the facts of this particular case.

To take section 27 first. It appears as one of a group of sections in that part of the Evidence Ordinance that deals with the inadmissibility of certain confessions. Section 24 renders inadmissible in evidence confessions produced under the stimulus of any inducement, and sections 25, 26 and 27 run as follows :—

" 25. (1) No confession made to a police officer shall be proved as against a person accused of any offence.

(2) No confession made to a forest officer with respect to an act made punishable under the Forest Ordinance, or to an excise officer with respect to an act made punishable under the Excise Ordinance, shall be proved as against any person making such confession.

26. (1) No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

(2) No confession made by any person in respect of an act made punishable under the Forest Ordinance or the Excise Ordinance, whilst such person is in the custody of a forest officer or an excise officer, respectively, shall be proved as against such person, unless such confession is made in the immediate presence of a Magistrate.

27. (1) Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

(2) Sub-section (1) shall also apply *mutatis mutandis*, in the case of information received from a person accused of any act made punishable under the Forest Ordinance, or the Excise Ordinance, when such person is in the custody of a forest officer or an excise officer, respectively."

This group of sections entered the law of Ceylon in the Evidence Ordinance of 1895. Their origin, however, lies considerably further back, since they must have been taken over from the Indian Evidence Act, which contained a similar set of provisions. In fact, they seem first to have appeared in the Indian Criminal Procedure Code of 1861, being numbered as sections 148, 149 and 150 of that Code. Then in 1872 they were taken out of the Code of Criminal Procedure and enacted separately as sections 25, 26 and 27 of the Evidence Act of that year. They have been a very familiar part of the criminal law administered in India, and there is a large body of judicial decision, not all of it consistent, that has been devoted to the interpretation of their provisions, in particular of section 27, the construction of which has always raised several special difficulties.

There can be no doubt as to what is the general purpose of sections 25 and 26. It is to recognise the dangers of giving credence to self-incriminating statements made to policemen or made while in police custody, not necessarily because of suspicion that improper pressure may have been brought to bear for the purpose of securing convictions. Police authority itself, however carefully controlled, carries a menace to those brought suddenly under its shadow ; and these two sections recognise and provide against the danger of such persons making incriminating confessions with the intention of placating authority and without regard to the truth of what they are saying.

Section 27, on the contrary, envisages a situation in which circumstances themselves vouch for the truth of certain statements made by an accused person, even though they are made in conditions that would otherwise justify suspicion. These are those statements that have led to the actual discovery of a proven fact when the information supplied by the accused has been the cause of the discovery. The principle embodied in section 27 has always been explained as one derived from the English common law and imported into the criminal law of British India by the legislators of the mid-nineteenth century. It can be traced in English law as early as the eighteenth century, see *R.* v. *Warickshall*, (1783) 1 Lea. 263 and *R.* v. *Butcher*, (1798) 1 Lea. 265n. The principle was stated by Baron Parke in the trial of *Thurtell and Hunt* (1825) (see Notable British Trials, page 145), where he said, " A confession obtained by saying to the party, ' You had better confess or it will be the worse for you ' is not legal evidence. But, though such a confession is not legal evidence, it is every day practice that if in the course of such confession that party state where stolen goods or a body may be found and they are found accordingly, this is evidence, because the fact of the finding proves the truth of the allegation, and his evidence in this respect is not vitiated by the hopes or threats that may have been held out to him. "

It is worth while to make the observation at this point that the reason given for allowing it to be proved that an accused person gave information

that led to the discovery of a relevant fact is not related in any special way to the making of a confession. It qualifies for admission any such statement or information that might otherwise be suspect on the ground of a general objection to the reliability of evidence of that type.

Section 122 (3) must now be set out. Its setting is Chapter XII of the Criminal Procedure Code, a chapter which has as its heading " Information to Police Officers and Inquirers and their Powers to Investigate " and runs from section 120 to section 133 inclusive. Of these sections, section 121 deals with information relating to the commission of a cognisable offence given to an officer in charge of a police station. Such information, when given orally must be reduced to writing by him or under his direction and read over to the informant, and the person giving it must sign the writing so produced. The section further provides that, if from information received or otherwise the police officer has reason to suspect the commission of a cognisable offence, he must send a report to the Magistrate's Court and proceed in person to the spot to investigate the facts and circumstances of the case and take such measures as may be necessary for the discovery and arrest of the offender. Finally, any police officer making such an investigation is empowered to require the attendance before himself of any person who appears to be acquainted with the circumstances of the case and such person is bound to attend as so required.

Section 122 is as follows :—

" 122. (1) Any police officer or inquirer making an inquiry under his Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined, but no oath or affirmation shall be administered to any such person, nor shall the statement be signed by such person. If such statement is not recorded in the Information Book, a true copy thereof shall as soon as may be convenient be entered by such police officer or inquirer in the Information Book.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer other than questions which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) No statement made by any person to a police officer or an inquirer in the course of any investigation under this Chapter shall be used otherwise than to prove that a witness made a different statement at a different time, or to refresh the memory of the person recording it. But any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such statements, nor shall he or they be entitled to see them merely because they are referred to by the court ; but if they are used by the police officer or inquirer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer or inquirer, the provisions of the Evidence Ordinance, section 161 or section 145, as the case may be, shall apply.

Nothing in this sub-section shall be deemed to apply to any statement falling within the provisions of section 32 (1) of the Evidence Ordinance, or to prevent such statement being used as evidence in a charge under section 180 of the Penal Code."

These sections dealing with criminal investigation were first enacted in Ceylon in 1898, although at that time the powers conferred were conferred only on inquirers specially appointed, and not on police officers in charge of stations. Later they were extended to police officers. Although they became part of the law of Ceylon by the Criminal Procedure Code, No. 15 of 1898, three years after the Evidence Ordinance had been enacted, it is doubtful whether any particular significance attaches to the fact that the one Ordinance was made later than the other, since they, too, like the sections of the Evidence Ordinance already quoted, were derived from comparable Indian legislation in which both groups had existed side by side.

The analogue to section 122 in Ceylon is section 162 in India, and consideration of the question how far section 27 is affected by section 122 in Ceylon necessarily invites the question how the relationship between the same sections was worked out in the Courts in India. The absence of any unanimous line of decision in those Courts and the fact that section 162 has been more than once amended in significant particulars prevent any simple answer to this question ; nor, if it were available, would it be conclusive in Ceylon. But in Their Lordships' opinion some notice of the Indian position is desirable, as it indicates the difficulties that have so long prevented the present problem from coming to a head, and also, they think, it suggests that there has been a general disposition to treat section 27 and section 162 as capable of effective co-existence.

From 1861 to 1872 these two sections were part of the same Code, the Criminal Procedure Code, in British India. In 1872, when section 27 was transferred to the Evidence Act, as already mentioned, there was inserted in section 162 a specific

saving for the operation of section 27. It is to be inferred that at that time it was not thought that there was anything inconsistent in principle in the two sections being allowed to operate, each according to its terms. This saving continued to appear until 1898 when, on amendments made to the Criminal Procedure Code, it was removed from section 162. No explanation of the significance of this change seems ever to have been forthcoming, and it may well have been one of those "improvements" that delight draftsmen who make them and tantalise Judges who then have to interpret them. However that may be, in recent years the express saving of section 27 has been restored to the Indian Code, thus eliminating for the future any controversy as to whether it could be wrong to give effect to section 27 at a trial, even though the information given by the person accused had proceeded from a section 162 investigation.

In the period that intervened between 1898 and the restoration of that saving the Indian Courts must frequently have been brought up against the problem of the impact of section 162 upon section 27. No final solution, however, was ever established, although the balance of authority seems to have been regarded as inclining in favour of treating section 27 as an exception from section 162, even without any saving words. Thus in the 6th Edition of *Sarkar on Evidence* published in 1939 (a significant date, as will appear later) it was stated at page 246, "The general rule that statements made by an accused to the police during an investigation cannot be proved does not affect the special exception in section 27. Statements admissible under that section can still be proved". See, too, *Woodroffe & Ameer Ali—Law of Evidence*, 9th Edition (1931) page 292.

It has to be recognised, however, that prior to 1939 the various High Courts of British India were not agreed as to whether the prohibition imposed by section 162, whatever its nature or extent, applied to an accused person at all. The decisions varied on this point, and it was not until the case of *Pakala Narayana Swami* v. *Emperor*, (1939) A.I.R. (Privy Council) 47, was decided by this Board that it was conclusively determined that statements made during a police investigation by a person then or subsequently accused were within the prohibition and could not be used at his trial. *Narayana Swami's* case did not touch section 27, but during the argument before the Board stress was laid on the point that, if section 162 did apply to the statements of an accused person, a very wide inroad had been made upon the application of section 27, contrary, presumably, to much of the existing practice at trials in India. The point was noticed by the Board in the opinion delivered by Lord Atkin (see page 52), but it was not necessary to the decision and was expressly left undecided. As he pointed out, section 27 might still have some, though a restricted, operation, even if all statements made by an accused person during investigation were banned ; and, further it was still open to Courts to decide that section 27 was a "special law" within the meaning of section 1 (2) of the Criminal Procedure Code and that section 162 did not constitute a "special provision to the contrary" for the purposes of that sub-section. If that construction were to prevail, it would follow that section 27 was unaffected.

When after 1939 the Courts in British India came to address themselves to this aspect of the problem, again no unanimous view emerged. The High Courts at Madras and Patna adopted the opinion that section 1 (2) did amount to a saving of section 27 : those of Lahore and Allahabad took the view that it had been "repealed". These conflicting decisions were reviewed in the High Court of Bombay by Beaumont, C.J., and Sen, J., in the case of *Biram Sardar* v. *Emperor*, (1941) A.I.R. (Bombay) 146, and the judgment of the Court, delivered by Beaumont, C.J., came down in favour of the view that section 27 was saved by section 1 (2) of the Criminal Procedure Code.

The different views entertained on this issue can no longer be of direct importance, now that the express saving of section 27 has been restored to section 162, but it is relevant to observe that the principle adopted by the High Courts of Bombay, Madras and Patna, in their construction of section 1 (2) treats that provision as being, in effect, no more than a statutory enactment of the general maxim "*generalia specialibus non derogant*", to which resort has so often to be made in matters of statutory interpretation. Their Lordships must consider later whether that maxim is not a valuable guide in dealing with section 27 and section 122 in Ceylon.

Another construction of section 162 also served for a time to confuse the issue in India. That was the view that the section did not operate to exclude the tendering of oral evidence of statements made in the course of an investigation, its purpose being merely to prohibit the production or use of the written record of such statements, which the

police officer receiving them was required to make. Such a consideration, which was favoured by some of the Indian Courts, meant a very serious restriction of the protection which it seems reasonable to suppose that section 162 was intended to secure. In 1923, however, the section was amended in a form which made it impossible for the future to admit any such distinction, the new wording being " such statement or any record thereof. "

A similar distinction has nevertheless been accepted and applied in several decisions of Courts in Ceylon over a considerable period of years and has only recently been departed from in two cases, of which one is that now under appeal ; and Their Lordships must, therefore, deal with this question of construction when they turn, as they now must, to the law of Ceylon and the meaning and effect of section 122 of its Criminal Procedure Code. Of the law of India they think that no more can safely be said on this topic than that for one reason or another section 27 has been treated generally, though not universally, as unaffected by section 162, but that the reasons for this treatment, as has been shown, have been too various and, in some cases, too unreliable to afford any sound basis upon which to build a construction of the corresponding provisions in the law of Ceylon.

In considering section 122 (3) and its effect, then, there are two separate questions to be answered. One is, whether the prohibition of using " statements " that it imposes applies only to the written records and does not exclude oral evidence of anything said. The other is, whether the effect of the prohibition, if it does cover oral evidence as well as the production of the written record, is to negative the rule contained in section 27 of the Evidence Ordinance that a statement distinctly relating to a fact discovered can be proved against an accused, even if made by him while in custody.

To take up the first of these questions. It seems plain, as has been pointed out already, that if it is really open to the prosecution to prove statements made by an accused person during police investigation by the process of calling the police officer to whom the statement was made and allowing him to recall orally what was said, apparently with the aid of his notes to refresh his memory, the accused has very little effective protection against the use of damaging statements, as, for example, admissions, that he may have made in reply to police questioning. This seems to Their Lordships to be a surprising result, when it is recalled that police investigations under Chapter XII procedure involve compulsory attendance on the part of persons summoned and compulsory reply to questions (except those tending to incriminate), without any oath administered or any opportunity for the person questioned to see the record made of his statements, much less to read it over and sign it. Moreover, the opening words of section 122 (3), " No statement made by any person . . . in the course of any investigation shall be used otherwise than, etc. " seem categorically to exclude the idea that such a statement can be proved positively against the maker of the statement as part of the prosecution's case. Yet this must be the consequence of any construction of section 122 (3) that treats the word " statement " throughout that sub-section as if it referred merely to the written record brought into existence by the police officer and that does not admit the connection of the prohibition with any general policy of forbidding the use at a criminal trial of statements obtained from an accused person by the use of the special procedure.

The practice of admitting oral evidence of statements made during investigation as substantive evidence and not merely allowing them to be used to contradict a witness making conflicting statements was evidently of long standing in Ceylon. It is spoken of with approval by Bertram, C.J., in *R.* v. *Pabilis*, (1924) 25 N.L.R. 424, when he said in reference to the words " to refresh the memory of the person recording them " in section 122 (3) " These words have always seemed to me to imply that an officer recording such a statement may (where the law allows it, *e.g.*, under section 157 of the Evidence Ordinance) give oral evidence as to the terms of that statement, but may not put in the written statement itself ". Similar views were expressed in two succeeding cases, *R.* v. *Gabriel*, (1937) 39 N.L.R. 38 and *R.* v. *De Silva*, (1940) 42 N.L.R. 57. The question was given fuller consideration in 1944 by a Court consisting of Howard, C.J., Moseley, S.P.J., and Wijeyewardene, J., see *R.* v. *Haramanisa*, (1944) 45 N.L.R. 532. Although their judgment called attention to the serious difficulties, involved in the interpretation of section 122 (3) and raised other objections, not now material, to the oral proof of statements that the law required to be recorded in writing, the Court adopted the same construction of the sub-section as that which had been accepted in the earlier cases and in certain pre-1923 decisions in High Courts in India (Bombay, Calcutta and Madras) and held that " the evidence

of the oral statement is not subject to the limitations imposed by section 122 (3) ". Since *ex hypothesi* such statements are made orally the Court's meaning would perhaps have been more accurately expressed if they had said that oral evidence of the statement was not subject to the section 122 (3) limitations.

None of these cases had been concerned with the question of section 27 itself. They had all related to evidence in corroboration of a witness as allowed under section 157 of the Evidence Ordinance, and, in fact, not all of the statements discussed were held in the end to be section 122 statements at all. The case of *R.* v. *Jinadasa*, (1950) 51 N.L.R. 529, however, involved section 27 directly. It was a decision of the Court of Criminal Appeal, consisting of five judges, Jayetileke, C.J., Dias, S.P.J., Gunasekara, Pulle and Swan, JJ. ; and the effect of the decision was to hold that an oral statement made during the course of a section 122 investigation can be proved under section 27 against an accused, the prohibition of its " use " applying only to the written record. The view of the Court can be taken to be summarised in the following quotation (page 540) : " Section 122 (3) imposes restrictions in the use of the police officer's record of the oral statement made to him, but does not govern the admission of oral evidence of such statement. Therefore, where the law otherwise permits such evidence to be given by a police officer, he may give oral evidence of any statement to him ". This is to re-state the opinion of Bertram, C.J., in *R.* v. *Pabilis*, (*supra*) in virtually the same words.

The reason of drawing the distinction between the use of oral evidence of a statement and the use of the written record of it rests wholly on certain deductions made from some of the phrases that appear in section 122 (3). Thus, no statement can be used " except to refresh the memory of the person recording it ". How can he refresh his memory, it is asked, except by referring to a written document ? To that question Their Lordships think that the correct reply is that, of course, he cannot, but that it by no means follows from that that as a matter of construction the words " no statement " at the beginning of the sentence are confined to the written record of the statement made. The words themselves do not suggest such a limitation, and the true view, in Their Lordships' opinion, is that in this opening sentence no distinction is intended between an oral statement or oral evidence of such statement and its written record. What is intended is that, except for the limited purposes specified, which may, indeed, require and contemplate no more than reference to the written record, statements made by a person under the special conditions of a police investigation are not to be used against him in any form, whether such evidence is tended orally or in writing.

Then it is said that there are further indications in the sub-section which show that the legislature was only dealing with use of the written record. Neither the accused nor his agents shall be entitled to " call for " such statements, or to " see them " merely because they are referred to by the Court. Here certainly it can be accepted that the statements spoken of are written material, for it is only such material that can be called for or seen ; but this point loses all force as a guide to construction of the prohibition contained in the opening sentence when it is appreciated that after the close of that opening sentence the next sentence begins " But any criminal Court may send for the statements recorded in a case under inquiry or trial in such Court, and may use such statements . . . ". Here the reference is explicitly to " statements recorded ", *i.e.*, the record itself, and there is no difficulty in seeing that in what immediately follows the words " such statements " do apply to the " statements recorded ", without throwing back any light upon the meaning of " statements " in the opening sentence.

The construction that had been adopted in the *Jinadasa* case was reconsidered in 1962 by the Court of Criminal Appeal (Basnayake, C.J., Sansoni, H. N. G. Fernando, Sinnetamby and de Silva, JJ.), in *Reg* v. *Buddharakkita Thera*, 63 N.L.R. 433. The evidence in question was a statement made by an accused person during the course of a police investigation, but it was not put forward as information leading to a discovery under section 27. The judgment of the Court, which was delivered by the Chief Justice, refused to accept the long-standing distinction between oral evidence of statements and the written record of them and held that the effect of section 122 (3) was to render the use of an oral statement made to a police officer in the course of an investigation just as obnoxious to it as the use of the same statement reduced into writing. The judgment pointed out, with what seems to Their Lordships to have much force, that the original form of this section, when enacted in the Criminal Procedure Code of 1898, had clearly intended its prohibition " No statement other than a dying declaration . . . shall if reduced to writing be signed by the person

making it or shall be used otherwise, etc.", to apply to all statements whether in oral or written form and however proved ; and the statement further commented on the unlikelihood of the legislature, when introducing its new form of Chapter XII, the primary purpose of which was to give police officers the powers of inquirers, intending to make a far-reaching change in the substance of the law.

In the judgment now under appeal the Court of Criminal Appeal has applied the construction of section 122 (3) adopted in *Buddharakkita's* case in preference to that favoured in *Jinadasa's* case, holding that the latter " must not any longer be regarded as binding ". For the reason that they have given Their Lordships are in agreement with the decision of the Court in *Buddharakkita's* case on this question of construction, and they of opinion that the *Jinadasa* construction is incorrect and ought no longer to be applied. Section 122 (3) then must be read as covering the use of oral evidence of statements made during police investigation just as much as the written records of such statements.

Before proceeding to the next point, the relation between section 122 (3) so construed and section 27, Their Lordships must notice an argument that was presented to them by the appellant to the effect that, on the principle of *stare decisis*, the Court in the present case acted wrongly in departing from the *Jinadasa* decision, one arrived at a few years earlier by the same Court constituted by a Bench of the same number of Judges. Their Lordships do not consider that it could serve any good purpose to deal with argument, since to do so could lead to no useful result. The principle of *stare decisis* may be invoked in more than one sense. It may lead a superior Court to adhere to an established line of decisions in Courts to which it is constitutionally a Court of error, even though, if the matter were to be raised for the first time, it would not itself agree with those decisions. It was not in that sense that the principle was advanced in this appeal, nor in a matter of this sort relating to an important aspect of evidence in criminal trials would Their Lordships have thought it proper to apply it. What was said was that the Court of Criminal Appeal in this case ought to have regarded itself as bound by the previous decision of the same Court in *Jinadasa's* case and should have treated itself as not being at liberty to depart from it.

But now that the legal issue as to the true construction of section 122 (3) has reached this Board, which is not bound in any sense by the *Jinadasa* decision, the issue has in any event to be argued and decided as open matter, and in a criminal cause, in which the incidence of costs is not material, it is merely academic to inquire at this stage whether the Court appealed from ought to have followed the earlier decision, even if it did not agree with the law as there expounded. In these circumstances Their Lordships do not think it necessary to express any opinion on the point.

Thus it now becomes necessary to decide what, if any, effect section 122 (3) has upon section 27, assuming, as Their Lordships now hold, that section 122 (3) bars oral evidence as well as written records and that, as the Board held in *Narayana Swami's* case it extends to an accused person as much as to any other witness. This question has been answered by the Court of Criminal Appeal in the judgment now under appeal, and they have held that a statement which cannot be used under section 122 (3) cannot be proved in any form under section 27. Consequently section 27 is to that extent, an important extent, repealed by implication by section 122 (3).

This view was evidently not at first regarded in Ceylon as a necessary consequence of the decision in *Buddharakkita's* case, which abolished the old distinction between oral evidence and written records under section 122. Thus in that case itself the judgment of the Court seemed to treat section 27 as still providing an exception to section 122 (3) ; and even as late as 1962 the Court of Criminal Appeal (Basnayake, C.J., Sansoni and Sinnetamby, JJ.), are recorded as saying (see *Reg.* v. *Don Wilbert*, 64 N.L.R. 83), " Having regard to the decision in *Buddharakkita* which is not yet reported, statements made in the course of an investigation under section 122 cannot be used, whether they be oral or written, except for the limited purpose contemplated by section 27 of the Evidence Ordinance ".

The basis of the Court's present decision rests upon the fact that there are certain express savings attached to section 122 (3), and one of these involves an actual reference to the Evidence Ordinance, since it is provided that " Nothing in this sub-section shall be deemed to apply to any statement falling within . . . section 32 (1) of the Evidence Ordinance ". The reference here is to the rule governing the admissibility of dying declarations. It is a very natural and persuasive

line of interpretation to argue that, if section 32 is expressly excepted, it cannot have been the intention of the legislature to except by implication another and separate section which is not referred to.

Their Lordships are certainly not unimpressed by the force of this reasoning. But the fact remains that both the sections in question stand in the Statute Book without any qualification that indicates the relationship of one to the other, and in the difficult task of interpreting the mind of the legislature with regard to them it seems necessary to look for guidance in a wider field than that of section 122 (3) itself as at present drafted. Both sections, as we know, were adopted by Ceylon from the existing legislation of British India, section 27 in 1895 and section 122 in 1898. Both, as has been shown, had originated in India in the same measure of 1861, and they had been administered since then under a system which treated section 27 as an express exception from the Indian section 162. It is reasonable to suppose therefore, that when they were incorporated into the legal system of Ceylon they were looked upon at the time as complementary rather than as conflicting provisions.

Is there anything to suggest the contrary in the way in which the Ceylon legislation was framed? It is true that section 122 came in three years after section 27, but considering their common Indian origin, it seems pedantic to attach any significance to the fact that one was enacted at a later date than the other. Their relationship cannot be determined by the mere sequence of dates. The question turns, it seems, not so much on the present form of section 122 (3) but on the form which its predecessor, section 125, assumed in the Criminal Procedure Code of 1898 ; for if that section on its first introduction is not to be read as overruling section 27, which had been introduced three years earlier, it would not be right to infer that the changes of drafting form which have led to the present wording of section 122 (3) were ever intended to bring about so important an alteration.

Portions of that section 125 have already been quoted. In full it ran as follows : " No statement other than a dying declaration made by any person to an inquirer in the course of any investigation under this chapter shall if reduced to writing be signed by the person making it or shall be used otherwise than to prove that a witness made a different statement at a different time ". There are two observations to be made upon the section expressed in this form. First, there is not in it, as there is in section 122 (3), any explicit reference to the Evidence Ordinance, although the exception of " a dying declaration ", no doubt, assumes that the rules of that Ordinance will be applied to govern the matter. Secondly, 1898 was the same year as that in which the saving of section 27 was omitted from the Indian section 162. The omission did not, as has been shown, lead to general change in the Indian practice of applying section 27, and Indian text-books continued to speak of section 27 as an exception from section 162. In such circumstances there seems to be altogether insufficient ground for attributing to the legislature in Ceylon an intention to wipe out the rule enacted in section 27 by the introduction of section 125 in the Criminal Procedure Code of 1898.

The question is, of course, a difficult one ; but Their Lordships are of opinion that the correct way to solve it is by applying the maxim of interpretation " *generalia specialibus non derogant* ". On the one hand, there is the Evidence Ordinance containing a precise and detailed codification of the rules that are intended to govern the admission and rejection of evidence. Among them is this section 27, a well-known rule, which has always been regarded as removing all objections to the statements that it deals with, so far as those objections rest upon misgivings as to the conditions under which such statements have been made. On the other hand, there is the Criminal Procedure Code not primarily concerned with rules of evidence at all but containing regulations for the special procedure of investigation under Chapter XII and manifesting a clear general intention based on the peculiarities of the procedure, to keep material produced by it out of the range of evidence to be used when a trial takes place. Their Lordships think that they must accept the conclusion that evidence falling within section 27 can lawfully be given at a trial, even though it would otherwise be excluded as a statement made in the course of an investigation under section 122.

It is necessary now to apply the legal principles that have been discussed to the trial of the respondent. He was charged, as has been said, with having shot one Piyadasa with a gun with such intention or knowledge and in such circumstances that had Piyadasa died by his act he would have been guilty of murder. This was a charge under section 300 of the Penal Code.

The evidence called for the prosecution included the evidence of two men, apart from Piyadasa, who were eye-witnesses of Piyadasa's shooting and who deposed, as did Piyadasa himself, to the fact that it was the respondent who fired the shot that injured Piyadasa. There may be some doubt whether or not one of these two eye-witnesses qualified his evidence under cross-examination, but, whether he did or not there was ample direct evidence placed before the jury to show that the gun-shot that injured Piyadasa was deliberately fired at him from a gun held by the respondent.

In addition to these witnesses a police sergeant, Jayawardene, was called by the Prosecution for the purpose of deposing to a statement made by the respondent in consequence of which " the ", or at any rate " a " gun was discovered. It has not been in dispute that at the time of making the statement the respondent was in the custody of the police and that the statement was made by him during the course of a police investigation by Sergeant Jayawardene.

The full statement was at no time placed before the jury. What happened was that in their absence from the Court the prosecuting Counsel told the Judge, who had the written record of the statement before him, that he proposed to " lead in certain portions of the statement made by the accused in consequence of which the gun was discovered ".

The full record of the statement that was before the Judge has been set out in the Judgment of the Court of Criminal Appeal and apparently that record ran as follows :—

" I am now leaving with the P.CC. 4358, 7326, 5617 and suspect Ramasamy to trace the gun.

1.9.60, at 3.25 p.m., Monte Cristo Estate, Line No. 6. Suspect Ramasamy points out to me a place in the garden opposite Line No. 6 and dug out the spot. Here I find a Wembley & Scott S.B.B.L. 12-bore gun barrel No. 10973 in three parts wrapped in an old gunny sack and 14 cartridges 12-bore in an oil cloth bag ranging as follows : 2 S.G., 2 No. 6, 2 No. 3, 7 No. 4 and 1 F.N. filled 12-bore cartridges. I smelt the barrel and there is a smell of gun powder and recent fouling in the barrel. I tied both ends covered with paper. I here take charge of them as productions. Here there is (?) shrub (*sic*) jungle in the vicinity. I now proceed to record his statement. Ramasamy *alias* Babun Ramasamy s/o Murugan, age 48 years, labourer of line No. 9, Monte Cristo Estate, states : ' This morning about 8 a.m. I was in my line-room. At this time I heard the shouts of people towards the upper line where I am residing. I came out and saw about 50 to 100 people collected outside the lines and there was pelting of stones. Just then I heard the report of a gun in the direction of Dhoby's line. I then came running to line No. 6 through fear. As I came running to line No. 6 I again heard the report of a gun towards the line of the mechanic. At the time I saw about 40 to 50 men and women including strikers and non-strikers shouting. As I came to the (verandah) back verandah I found a 12-bore gun broken lying on ground and some cartridges in an oil cloth bag. I broke the gun into three pieces picked up a gunny sack and wrapped the parts of the gun with the bag of cartridges buried in the garden opposite line No. 6. I am prepared to point out the place where the gun and cartridges are buried. I deny having shot at anyone. I am one of the strikers. This is all I have to state. Read over and explained and admitted to be correct '.

I am now leaving with P.CC. 4358, 7326 and 5617 and suspect Ramasamy to trace the gun. 3.25 p.m. Monte Cristo Estate opposite line No. 6. On the statement made by Ramasamy I recorded one S.B.B.L. 12-bore Wembley & Scott gun No. 10973 broken in three parts, barrel butt and hand guard wrapped in an old gunny sack and one oil cloth bag containing 14 cartridges 12-bore ranging as follows : 2 S.G., 2 No. 6, 2 No. 3, 7 No. 4, and one F.N. filled 12-bore cartridges. I found them buried in the garden where shrub jungle is found. I smelt the barrel. It is smelling of fouling and gun powder. I find the barrel fouled and signs (?) of recent firing. I have (tied) covered and tied both ends and taken charge as productions. At 4.20 p.m. I produced the productions, gun and cartridges, and the suspect Ramasamy before I.P."

Prosecuting counsel wished to put in the words " I picked up the parts of the gun wrapped up in a gunny sack and a bag of cartridges buried in the garden opposite line No. 6 " (*sic*). The Judge, however, directed him that he must confine himself to proving the words " I am prepared to point out the place where the gun and the cartridges were buried ". Plainly both of them were treating the statement as one coming within the rule of section 27 and intended to limit the words proved against the accused to those which " relate distinctly to the fact thereby discovered ".

The respondent's counsel had not at that time seen the record of the statement, and section 122 (3) does not give him any general right to call for it merely because the Judge refers to it. He did state, in answer to the Judge, that he did not object to the words indicated but that he objected to the other part of the statement going in. The Judge assured him that he was not going to allow that.

The evidence of the respondent's statement was then put before the jury in this limited form. Sergeant Jayawardene was cross-examined on it by Counsel for the respondent, the cross-examination being directed at the outset to establishing that the respondent had never produced " this gun " to him, never pointed out and never made

a statement to him about it. The witness rejected these suggestions. At this stage of the trial the Judge handed to respondent's counsel the witness's diary, in which the statement attributed to the respondent was recorded, and his counsel was thus afforded his first opportunity of seeing in writing what the rest of the recorded statement amounted to.

The respondent did not give evidence. In his summing-up to the jury the Judge indicated to them clearly that in his view the most important part of the evidence was that of Piyadasa himself and the two other eye-witnesses, and said that their " verdict must, surely, rest in this case upon your belief or disbelief " of those witnesses. With regard to the evidence of Sergeant Jayawardene as to the finding of the gun he directed them that it meant nothing more than that the accused was aware of where a gun and cartridges were buried, not necessarily buried by him.

The jury brought in a unanimous verdict of guilty after seventeen minutes retirement. The Court sentenced the respondent to ten years' rigorous imprisonment.

His appeal against conviction and sentence was allowed by the Court of Criminal Appeal on the ground that Jayawardene's evidence as to the information leading to the discovery of the gun and cartridges was improperly admitted, since section 27 did not permit the giving of evidence that was covered by section 122 (3). Their Lordships have already expressed their opinion on this question, and in their view section 27 is not displaced in the way that has been suggested. Consequently they are not able to support the Court of Criminal Appeal's judgment on this aspect of the law and they must hold the conviction to have been wrongly set aside.

There are, however, two further points to which allusion must be made before the appeal is disposed of. Having regard to the view of the law taken by the Court of Criminal Appeal it was necessary for them, as it is not for Their Lordships, to consider the further question whether they ought to exercise the power given to them by the proviso to section 5 of the Criminal Appeal Ordinance and dismiss the respondent's appeal on the ground that his conviction had not actually involved any substantial miscarriage of justice. In dealing with this the judgment delivered by the Chief Justice dwells largely upon what he described as the grave prejudice inflicted upon the respondent by the form in which Sergeant Jayawardene's evidence of the statement made to him was put before the jury. Their Lordships have thought it necessary to give careful attention to this point, which was fully argued before them, so as to assure themselves that his evidence, even if admissible under section 27, was not vitiated by the partial nature of the statement proved or by some improper treatment of it in the Judge's summing-up to the jury.

In their opinion no objection can be maintained on either of these grounds. It is quite true that the words " the gun " and " the cartridges ", if put before the jury as words attributed to the accused in connection with the discovery, are capable of suggesting or even likely to suggest a positive connection between the gun discovered and the gun with which Piyadasa was shot, which the full statement did not bear out. For in another part of statement the accused states that having heard the sound of two gun shots, he had come running up to the back verandah on the Monte Cristo estate and that he had found here a 12-bore gun, broken, lying on the ground and some cartridges in a bag. He says that he had broken the gun into three pieces, picked up a sack, wrapped the parts of the gun with the bag of cartridges and buried them in the garden opposite line No. 6. Only after these statements does he state that he is prepared to point out the place where the gun and cartridges were buried. He then says that he denies having shot at anyone.

What is said is that, if the words admitted by the Judge were to be admitted at all, it could not be just or fair to the accused to allow them to be placed before the jury without letting them hear also the explanatory and self-exculpatory words which formed the context of his offer to show where the objects were buried. Their Lordships do not consider this objection to be well founded. The Judge in admitting the words relating to the discovery was applying the rule laid down by section 27. That rule limits the admissible words, whether they amount to a confession or not, to those relating distinctly to the fact discovered. He is not at liberty to go beyond that limit, however much the prosecution may wish to do so, and it has always been regarded as the correct practice that Judges should be strict in applying the requirement that the words admitted must " relate distinctly " to the fact. No doubt, it is considered that such a practice is likely, on the whole, to tell in favour of an accused, even though it may result in the exclusion of self-exculpatory statements.

The present case illustrates the difficulty of allowing the rule to be applied in any extended way. In order to show the exact significance of the words " the gun " when used by the respondent the Judge would have had to direct the prosecution to supplement them by putting in as well so much of his statement as set out his story of the finding of a gun on the verandah and of his decision to pick it up and bury it and the cartridges, without any explanation offered of his reason for acting in such a suspicious way. A Judge might very reasonably suppose that to put this in on top of the other evidence would only make the case against the accused the blacker for the addition. To direct such evidence to be put in, without any application from the defence counsel (who, it must be remembered, had seen the full record of the statement before the close of Jayawardene's evidence) and in face of the line being taken in his cross-examination of that witness that the accused had never made any statement to him at all, would not, in Their Lordships' opinion, have represented the duty of the Judge conducting the trial that was taking place before him. They do not think that he can be charged with having misconducted the trial in this regard.

The course that he did adopt when he came to sum-up to the jury appears to them to have been the correct way of handling his difficult problem. On the one hand, as has been pointed out, he told the jury to concentrate on the question whether they were going to believe or disbelieve the evidence of the eye-witnesses. On the other hand, he suggested to them that the evidence about the finding of the gun did not amount to anything very much. The gun discovered, he said, was one that, according to the Analyst, " could possibly have caused the injuries ", because " with this gun you can fire S.G. slugs ". The prosecution's point was, he said, that if the accused did point out that gun, it was because he knew where it was. He then explained the respective positions of the prosecution and the defence as follows :—

> " Well, the Defence has challenged Jayawardene and said he is nothing more than a liar in uniform. That is the suggestion. The Defence alternatively argues, even if that suggestion of the Defence is not accepted, but Jayawardene is believed when he says that the Accused pointed out the gun, the statement of the Accused is that he could point out a place where a gun and cartridges are buried. The Defence, therefore, argues that means nothing more than that the Accused was aware of where a gun and cartridges were buried, not necessarily buried by him. I did not understand the Prosecution as placing the case any higher than placed by the Defence Counsel himself. The Prosecution does not say that it proves anything more than showing a place where a gun and 14 cartridges were buried, and this was about 3.25 or 3.30 that the cartridges were unearthed. Well, gentlemen, that is the evidence in this case. "

With the matter put to the jury in that way in the summing-up Their Lordships do not think that it can fairly be said that any injustice was caused to the defence by the words of the statement that were admitted under the rule of section 27 being admitted in the limited form chosen by the Judge.

It remains to place on record one further observation which arises out of certain strictures contained in the judgment of the learned Chief Justice reflecting upon the handling of the prosecution's case at the trial and the evidence of Sergeant Jayawardene. His comments on the conduct of counsel for the Crown are to be found in the last two paragraphs of his judgment, and it is sufficient to note in referring to them that they attribute to the prosecution a lack of proper fairness and detachment in the presentation of the case and even a conscious attempt to mislead the Court. This censure, which is of the gravest order, was not supported in any particular by counsel for the respondent in his argument before the Board. Their Lordships have found no justification for it, and they think that it must have arisen from an insufficient appreciation on the part of the Court of the limitations imposed by observance of the conditions of section 27 and of the part played by the Judge himself in the instant case in directing what part of the accused's statement he would allow to go before the jury. Their Lordships must dissociate themselves from any endorsement of the learned Chief Justice's words of censure.

As to Sergeant Jayawardene's evidence at the trial it is described by the Chief Justice as a reprehensible attempt at " *suggestio falsi et suppresio veri* ". Any Court reviewing the written record of a witness's oral evidence under examination and cross-examination is at liberty to form its own conclusion as to his intentions and *bona fides*' even if the attribution to him of gross bad faith is usually regarded as an exceptional departure on the part of an appellate Court. Their Lord-

ships are certainly in no better position than the Court of Criminal Appeal to form a judgment on this matter ; they will merely state with regard to this witness that neither their own analysis of his evidence nor the criticisms of it made by the learned Chief Justice have seemed to them to require so hostile a conclusion.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the Judgment and Order of the Court of Criminal Appeal, dated 17th December, 1962, set aside and the verdict of the jury finding the respondent guilty of the offence of attempted murder, dated 21st December, 1961, restored. Since his appeal to the Court of Criminal Appeal was against sentence as well as against conviction and the appeal against sentence did not come up for consideration owing to the Court's decision to quash the conviction, the appeal should now be remitted to that Court for hearing of the appeal against sentence on the basis that the verdict of the jury is to stand. In accordance with the condition imposed when special leave to appeal to the Board was granted the appellant must pay the respondent's costs of the appeal.

Appeal allowed.

Present : **Sirimane, J.**

MOHAMMED LEBBE *vs.* A. MADANA, (D.R.O., Yatinuwara)*

Application for Revision in M.C. Kandy, Case No. 33916.
(*S.C. No.* 545/63).

Argued on : 22nd May, 1964.
Delivered on : 5th June, 1964.

Land Acquisition Ordinance, sections 38, 40 *and* 42 (2)—*Powers accruing to officers acting thereunder and nature of procedure to be followed—Does the owner of land already acquired thereunder have a right to appear and show cause against an application made under section* 42 (2) *for an order of possession.*

Held : That an application made to a Magistrate under section 42 (2) of the Land Acquisition Ordinance for an order directing the Fiscal to deliver possession of land sought to be acquired by the Crown is an *ex-parte* one and there is no provision for anyone to be heard in opposition thereto.

Distinguished :—*Loku Banda* v. *Assistant Commissioner of Agrarian Services,* (1963) LXV C.L.W. 31 ; 65 N.L.R. 401.

George Candappa, for the respondents-appellants.

S. Sivarasa, Crown Counsel, for the applicant-respondent.

SIRIMANE, J.

One Ananda Madana, the D.R.O. of Uda Nuwara and Yatinuwara, applied to the Magistrate's Court of Kandy under section 42 (2) of the Land Acquisition Ordinance (Chapter 460) for an order directing the Fiscal to deliver possession of the land sought to be acquired by the Crown. A notice had been issued on the appellants (to which, in my opinion, they were not entitled) and they claimed a right to show cause against this application. Their claim was disallowed by the learned Magistrate, and they have moved this Court to revise the Magistrate's order.

Section 42 (2) reads as follows :—

> " Where any officer directed by an Order under section 38 to take possession of any land is unable or apprehends that he will be unable to take possession of that land because of any obstruction or resistance which has been or is likely to be offered, such officer shall, on his making an application in that behalf to the Magistrate's Court having jurisdiction over the place where that land is situated, be entitled to an order of that Court directing the Fiscal to deliver possession of that land to him for and on behalf of Her Majesty."

Section 38 provides (*inter alia*) that the Minister may by an Order published in the *Gazette* direct the acquiring officer or any other officer authorised by such acquiring officer to take possession of the land acquired. Where it becomes necessary to take immediate possession of such land on the

*For Sinhala translation see Sinhala section Vol. 8, part 5, p. 20

ground of any urgency the Minister is empowered by this section to publish an Order directing an officer to take possession even before questions of compensation, etc., are settled.

Section 40 provides that where an Order is made under section 38 authorising an officer to to take possession, the land in question vests absolutely in Her Majesty free from all encumbrances.

An examination of the relevant sections in the Ordinances shows that the scheme of the Ordinance is to enable the Crown to take immediate possession of a land which is urgently needed for a public purpose. The words of section 42 (2) quoted above clearly show that " any officer directed by an Order under section 38 to take possession *shall* . . . *be entitled* to an Order of Court directing the Fiscal to deliver possession ".

The case of *Loku Banda* v. *The Assistant Commissioner of Agrarian Services, Kandy,* (reported in 65 N.L.R., at page 401) relied on by the appellants can easily be distinguished. There, the Assistant Commissioner of Agrarian Services sought the enforcement of an " Eviction Order " made under section 3 (*b*) of the Paddy Lands Act, No. 1 of 1958. Section 21 of that Act provides the procedure to be adopted when such an enforcement is sought. A written report has to be presented to Court and section 21 (2) provides that the Court should issue summons to the person named in such report *to appear and show cause* on dates specified in the summons.

I am of the view that the learned Magistrate was correct when he reached the conclusion " that what is contemplated is an *ex-parte* application for something in the nature of a writ . . .". The appellants are not entitled to be heard in opposition to the application made to Court by the D.R.O., and this application to revise the order of the learned Magistrate is refused with costs.

Application refused.

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

DON PIYADASA *vs.* SENEVIRATNE, (Sub-Inspector of Police, Homagama)*

S.C. 188/1964—*M.C., Colombo South, No.* 34737/D.

Argued and decided on : 3rd June, 1964.

Postponement, application for, in criminal case, by Proctor stating he was retained only to apply for date—Refusal by Magistrate—Application renewed on the ground that documents and witnesses not available—List of witnesses not filed—Application refused as no list filed—Accused himself ready for trial—Trial proceeded and adjourned to enable prosecution to cite witness already listed—Whether this course prejudicial to accused.

A Proctor made an application for postponement of the trial in the Magistrate's Court on the ground that he was retained only that morning for the purpose of making an application for a date. This application having been refused, he renewed the application on the ground that the documents and witnesses in support of the defence were not available The Magistrate, on being satisfied that a list of witnesses had not been filed in the case, refused a date on the ground that there was no merit in the application. The accused himself being ready for trial, the trial proceeded, and after three witnesses for the prosecution gave evidence a date was given to cite a witness in the list attached to the plaint.

On the accused being convicted later, he appealed.

Held : (i) That in the circumstances, the Magistrate was justified in refusing the applications for postponement made to him.

(ii) That no prejudice was caused to the accused by the Magistrate hearing part of the case for the prosecution and adjourning the trial for another date.

Per SRI SKANDA RAJAH, J.—" This Court cannot understand a proctor being retained in the Magistrate's Court only for the purpose of making an application for a date. "

* For Sinhala translation, see Sinhala section, Vol. 8 part 5, p. 19

D. R. P. Goonetillake, for the accused-appellant.

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

SRI SKANDA RAJAH, J.

I find no reason to interfere either with the conviction or the sentence. But, I feel I should make certain observations in view of some submissions made to this Court. Mr. Goonetillake, for the appellant, drew my attention to the proceedings under date 9th May, 1963, and submitted that it is a senior proctor practising in the Colombo South Magistrate's Court who moved for a postponement and it was refused. He also drew my attention to the fact that certain representations have been made by this proctor against the Magistrate concerned and an inquiry is being held against the Magistrate.

This proctor's application for a postponement was first on the ground that he was retained only on that morning for the purpose of making an application for a date. The Magistrate proceeded to record, " No valid reason has been given to me why a postponement was necessary and, therefore, I refuse the application ". I think the Magistrate was entitled to do so. Being a senior proctor he should have realised that in most Magistrate's Court cases necessary instructions can be taken in a few minutes. This Court cannot understand a proctor being retained in the Magistrate's Court only for the purpose of making an application for a date. After the Magistrate refused that application this proctor came out with some other story that the documents and witnesses in support of the defence were not available and the Magistrate rightly scrutinised the record and said that he did not find a list of witnesses filed in this case. It did not appear to the Magistrate that there was any merit in the application. I am of the view that the Magistrate rightly refused the application.

Mr. Goonetillake submitted that the proctor must have made these applications because he did not want this particular Magistrate to hear this case. The simple answer to this is that if that was the reason it should have been so stated to the Magistrate instead of adopting devious methods.

The accused himself was ready for trial and the trial proceeded. Then at the end of the evidence of three witnesses for the prosecution a date was given to cite a witness, whose name appeared in the list attached to the plaint. That witness was to speak only with regard to the fact that the liquid sold was Government arrack.

It was submitted that because the prosecution itself was not ready a date should have been given when the application was made by the defence for a postponement. I am not in a position to agree that if one witness for the prosecution is absent it will cause any prejudice to the accused, if the rest of the evidence for the prosecution is heard and the trial is adjourned as in this case. In this case no prejudice was caused to the accused. Besides the prosecution does not appear to have told the Magistrate that it was not ready to go on with the case. Therefore, there was no reason not to go on with the rest of the case for the prosecution.

From the numerous cases this Court has dealt with I am constrained to observe that in the Colombo South Magistrate's Court for a number of years the practitioners have had it their own way and cases have been postponed on many occasions on their applications for no valid reason and rarely a case came up for trial within two years of the date of the institution of the same, *e.g.*, S.C. Minutes of 24th April, 1964,—in Revision in M.C., Colombo South, No. 22304/N, and No. 24228/H. Perhaps, after such long indulgence when a Magistrate takes a sterner view and rejects applications for postponements he becomes unpopular.

I am quite satisfied that the applications for postponements in this case were rightly refused by the Magistrate.

The appeal is dismissed.

Appeal dismissed.

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

KARUNATILAKE (Chairman, V.C. Nikaweratiya) *vs.* PUNCHI BANDA*

S.C. 182/'64—*M.C. Kurunegala*, 24566.

Argued on : 13th May, 1964 and 4th June, 1964.
Decided on : 4th June, 1964.

Criminal Procedure Code, section 114—*Application by local authority to abate public nuisance.*

Held : That a local authority is not entitled to an order under section 114 of the Criminal Procedure Code for preventing an inhabitant of an area from resisting the dumping of night soil, in a trenching ground in his neighbourhood resulting in a nuisance to him although this ground had been used for this purpose previously for a long time.

Per SRI SKANDA RAJAH, J.—" That section 114 of the Criminal Procedure Code is meant to be used in urgent cases of public nuisance and an order made under that section cannot extend beyond 14 days ".

G. T. Samarawickrama, for the appellant.

R. F. St. C. Kodagoda, for the respondent.

P. Colin Thome, Crown Counsel, as *amicus curiae.*

SRI SKANDA RAJAH, J.

The Chairman of the Village Committee of Nikaweratiya made an application to the Magistrate under section 114 of the Criminal Procedure Code alleging that the respondent was committing a public nuisance by preventing the labourers of the Village Committee from burying night soil in the trenching ground used by the Village Committee for a long time and was thereby interfering with and obstructing the work of the Village Committee labourers. He also alleged that the health of that area would be endangered.

Section 114 is meant to be used in urgent cases of public nuisance and an order made under that section cannot extend beyond a period of 14 days. In this case the Magistrate did not make order under that section but issued a notice on the respondent. He appeared and showed cause against an order being made by the Magistrate.

It is evident from the plan P 1 of 1955 that this particular land had been described as a trenching ground of the Village Committee ; but, the land still belongs to the Crown and it had not been vested in the Village Committee. I do not think that question need be considered in this case.

The Crown has allotted the adjoining land to allottees with the result that this trenching ground, if allowed to be used, would be a danger to public health. It would also appear from the evidence that had been recorded that another land, about a mile away, was offered by the Crown to the Village Committee for the purpose of trenching their night soil ; but, the Chairman of the Village Committee does not appear to have taken any steps to get that land vested in the Village Committee so that the night soil may be trenched there.

To allow this trenching ground to continue, as I have already remarked, would endanger the health of the people in that area. In short, it is the Chairman of the Village Committee who is making a nuisance of himself by insisting on dumping night soil in this land. Therefore, the order of the Magistrate is upheld.

The appeal is dismissed with costs fixed at Rs. 105/-.

Appeal dismissed

* For Sinhala translation, see Sinhala section, Vol. 8 part 6, p. 22

Present : **Basnayake, C.J., and Abeyesundere, J.**

WALTER PERERA *vs.* CHARLES RATNATUNGA

S.C. No. 125/1961—*D.C. (Inty.) Colombo, No·* 9443/*L.*

Argued on : February 12, 13 19, 20 and 21, and March 4, 1964.
Decided on : July 15, 1964.

Servitudes—Acquisition of servitude of light and air by prescription—Whether adverse possession necessary in case of negative servitudes—Mere enjoyment of such right insufficient—Position not different in the Roman-Dutch Law—Prescription Ordinance, section 3—Sole law now governing this subject to be the Prescription Ordinance.

Judicial Precedent—Decision reported as Full Bench but only two out of the three Judges actually present at the hearing—Supreme Court consisting of only three Judges at such time—Full Bench of three Judges taking part in the decision of the appeal—Whether such decision binding on Bench of two Judges.

Held : (1) That a right of servitude of light and air could be acquired by prescription only in terms of section 3 of the Prescription Ordinance, which Ordinance made no distinction between positive and negative servitudes.

(2) That to satisfy the requirements of section 3, possession must be by an adverse title and there must be some positive act or acts from which the fact of such possession can be inferred. The mere fact that a person has enjoyed light and air because his neighbours did not build higher is not sufficient possession to come within section 3 of the Prescription Ordinance.

(3) That even in the Roman-Dutch Law the better view appeared to be that such a servitude could not be acquired by mere inaction or by the mere assertion by one party that the other has not got certain rights or by forbidding the other from exercising his right.

(4) That the decision in the case of *Neate* v. *Abrew*, 5 S.C.C. 126, is not a Full Bench decision as the appeal was heard only before two of the three Judges who delivered judgment. This decision is not one that can be regarded as authoritative.

(5) That the decision in *Pillay* v. *Fernando*, 14 N.L.R. 138, where the Court thought itself bound to follow *Neate* v. *Abrew*, should also not be followed.

Per BASNAYAKE, C.J.—(*A*) " It is now settled law that the Prescription Ordinance is the sole law governing the acquisition of rights by virtue of adverse possession, and that the common law of acquisitive prescription is no longer in force except as respects the Crown. The question that arises in the instant case has, therefore, to be decided by reference to that Ordinance."

(*B*) " To satisfy the requirements of section 3, possession must be by an adverse title. The mere assertion by one party that another has not got certain rights or that he forbade the other to exercise such rights, even though the other may also acquiesce there, does not give rise to an adverse title where on a claim of prescription can be used. Possession in the Ordinance has to be given its ordinary meaning, and the light and air that are enjoyed, because the neighbour has not built higher, cannot be said to be possessed by the land-owner who derives benefit therefrom. The opinion we have formed is in accord with the enactment and creates no hardship. In fact, it does away with the hardships that the hitherto reputed view of the Roman-Dutch Law created."

(*C*) " It would appear from the judgment in the South-African case, which is in Afrikaans and which has been read to me, and from the extracts from the commentators referred to in a note in Volume 74 of the South African Law Journal, at page 135 that there has been no judgment either of the Courts of Holland or South Africa wherein it has been decided that a negative servitude had been created by prescription. We are in entire agreement with the view of the learned author of the note that the creation of a negative servitude by prescription is subject to requirements which are so difficult to fulfil that the creation of such a servitude is a theoretical rather than a practical possibility."

Not followed : *Neate* v. *Abrew*, (1883) 5 S.C.C. 126 ; Wendt Reports 188
Pillay v. *Fernando*, (1905) 14 N.L.R. 138.

Cases referred to : *Perera* v. *Pody Singho*, (1901) 5 N.L.R. 243; 2 Browne's Reports 344.
Ayanker Nager v. *Sinnatty*, (1860-62) Ramanathan Reports 75; (1860) Legal Miscellany 65.
Ellis v. *Laubscher*, (1956) 4 S.A.L.R. (A.D.) 692.

Texts cited : Schorer's Notes to Grotius, Bk. II, 34, 20.
Savigny—Possession (Perry's Translation, 6th Ed.), pages 384-386.
LXXIV South-African Law Journal, p. 135.
Erskine's Principles of the Law of Scotland (19th Edn.), page 213.
Stair—Institutions of the Law of Scotland, Vol. I, p. 408.

H. V. Perera, Q.C., with *H. W. Jayawardene, Q.C., C. G. Weeramantry, N. S. A. Goonetilleke* and *D. C. Amerasinghe*, for the defendant-appellant.

C. Ranganathan with *E. B. Vannitamby* and *K. N. Choksy*, for the plaintiff-respondent.

BASNAYAKE, C.J.

This is an appeal against the order of the District Judge directing that an injunction be issued to the defendant-appellant (hereinafter referred to as the " appellant ") restraining him from further proceeding with the construction of the Eastern wall of his building pending the final determination of the action instituted by the plaintiff-respondent (hereinafter referred to as the " respondent ").

The appellant and the respondent are owners of adjoining premises in Norris Road. The former owns premises No. 59 (at one time 55A, 57 and 59) and the latter No. 61. No. 59 was till about June, 1960, a building with one floor and No. 61 a building with two floors. The appellant pulled down his house and erected thereon a multi-storeyed building which rose above the respondent's building. The result was that the light and air which the respondent's building had received through certain windows which overlooked the appellant's land were cut out. The respondent asserted that the appellant was not entitled to build any structure on his land which deprived him of light and air. This action was accordingly instituted in assertion of the right he claimed. The learned District Judge held that the respondent had by " prescription obtained the servitude *ne luminibus officatur* ". He rested his decision on *Neate* v. *Abrew*, (5 S.C.C. 126), which he regarded as binding on him. Learned counsel for the appellant submitted that, although, *Neate* v. *Abrew* (*supra*), is shown in the report as a decision of three Judges, it is, in fact, a decision of two Judges and is not a decision of the then Collective Court. This submission finds support in the following statement at page 127 of the report—

> " The appeal was argued on the 26th September, 1882, before CLARENCE and DIAS, JJ. It was afterwards arranged, with the consent of counsel on both sides, that De Wet, A.C.J., should be furnished with a note of the authorities cited, and should take part in the decision of the appeal."

We agree that the decision cannot be regarded as a decision of the then Full Bench of three Judges, as the appeal was heard only before two of the three Judges who have delivered judgment. We are fortified in our view by the following observations of Bonser, C.J., in a similar case, *Perera* v. *Pody Singo*, (5 N.L.R. 243, at 244-245)—

> " But, as I said before, the respondent relied upon what he alleged was the decision of a Full Court, which would be binding on me, holding that no appeal lay in a case like the present. But, on examination of this case, it will be seen that it is of no authority. What happened was this. The late Chief Justice and Mr. Justice Lawrie sat together to hear the appeal. They were unable to agree upon the admissibility of the appeal, and, instead of the case being referred to a Full Court for argument and decision, counsel on both sides agreed to leave the matter to the arbitrament of the third judge. The third judge, after reading the case, but without hearing any argument, expressed the opinion that an appeal did not lie. It is quite evident that that expression of opinion of the third judge could have no binding effect on the parties unless they had agreed to accept it. That being so, it is of no use citing it as an authority, and I cannot understand why any reporter should have thought fit to report it."

The decision has, therefore, not the binding effect of a decision of the Full Bench. In our opinion, *Neate* v. *Abrew* (*supra*), is not a decision which can be regarded as authoritative.

Before parting with the case of *Neate* v. *Abrew* we should not fail to record our respectful dissent from the case of *Pillay* v. *Fernando*, (14 N.L.R. 138), wherein following *Neate* v. *Abrew*, it was held that a right of servitude of light and air may be acquired by prescription by mere enjoyment, just as much as any other servitude. Went, J., while agreeing that under the Roman Dutch Law mere enjoyment however long was not sufficient to create a negative servitude and that a positive act of adverse possession extending over the prescribed period on the part of the dominant tenement was needed, held that he was bound by the decision in *Neate* v. *Abrew* which he, without close scrutiny, regarded as a decision of the Full Court. But some of the dicta expressed therein emphasize, though not sufficiently, that the ser-

vitude of *ne luminibus officatur* cannot be acquired by the mere fact that the neighbour has not built on his land for any length of time. District Judge, Lawrie, whose judgment is reproduced in the report, says—

> " I am of opinion that the mere circumstance of having made no objection to his having opened these windows does not infer acquiescence by the defendant, nor confer on the plaintiff a right to prevent her making full use of her own property."

Clarence, J., having said—

> " There can be no question but that, under the Roman-Dutch Law, a negative servitude such as this could not be acquired by prescription in virtue of bare enjoyment such as plaintiff has had in this case."

goes wrong when he says, on an incorrect reading of the decision in the case of *Ayanker Nager* v. *Sinatty* (Ramanathan, 1860- 2, p. 75)—

> " The result then is that the mere uninterrupted enjoyment for ten years (not, of course by express permission or licence) of window rights, deriving light from a neighbour's land, entitles the owner of the windows to have an adjoining landowner restrained from building so as to obscure them."

It is common ground that the Roman-Dutch Law of acquisitive prescription ceased to be in force after Regulation 13 of 1882 and that the rights of the parties fall to be determined in accordance with the provisions of the Prescription Ordinance. It is now settled law that the Prescription Ordinance is the sole law governing the acquisition of rights by virtue of adverse possession, and that the common law of acquisitive prescription is no longer in force except as respects the Crown. The question that arises in the instant case has, therefore, to be decided by reference to that Ordinance. But it would not be entirely irrelevant to add a word or two on the Roman Dutch Law before examining the provisions of that Ordinance.

Although opinion appears to be divided among Roman-Dutch Law writers, the better view appears to be that a servitude cannot be acquired by mere inaction or by the mere assertion by one party that another has not got certain rights, or by forbidding the other from exercising his rights. Mere abstention from doing something at the request of a neighbour does not give rise to a servitude, (Schorer's Notes to Grotius, Bk. II, 34, 20). In the case of *Ellis* v. *Laubscher*, (1956) 4 S.A. 692 (A.D.), the South African Appellate Division had occasion to examine the old and modern authorities on negative servitudes, and it formed the conclusion that there must be, as in the case of positive servitudes, adverse possession to acquire a negative servitude. The nature of adverse possession in relation to the acquisition of a negative servitude by prescription is discussed in that case. Savigny, too, examines the problem (Possession, 6th Edn., Perry's Translation), at pages 384-386. He takes the view that possession of a negative servitude cannot be acquired by mere passiveness on the part of the opposite party, but that user as of right is required. He comes to the conclusion that possession of a negative servitude may be acquired by adverse user and by legal title. It would also appear from the judgment in the South-African case, which is in Afrikaans and which has been read to me, and from the extracts from the commentators referred to in a note in Volume 74 of the South African Law Journal, at page 135, that there has been no judgment either of the Courts of Holland or South Africa wherein it has been decided that a negative servitude had been created by prescription. We are in entire agreement with the view of the learned author of the note that the creation of a negative servitude by prescription is subject to requirements which are so difficult to fulfil that the creation of such a servitude is a theoretical rather than a practical possibility.

Now as to the Prescription Ordinance, section 3 of that Ordinance reads—

> " Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce , or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs :
>
> Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute."

The question for decision is whether the respondent possessed the light which his windows received at the time the appellant erected his new building. Adverse possession has to be evidenced by some positive act or acts from which the fact of such possession can be inferred. As aptly stated in *Ayanker Nager's* case (*supra*)—

> " Altogether the Supreme Court has no doubt that the words '*possession of immovable property*' in the Ordinance may apply to enjoyment of a right of way. There must be actual enjoyment, not mere claim of title or abstract right, and the Supreme Court may define ' possession ', when applied in legal language to a servitude, such as the *jus itineris*, to be the exercise of a *jus in re*, with the *animus* of using it as your own as of right, not by mere force, not by stealth, and not as a matter of favour, *nec vi*, *nec clam*, *nec precario*."

the Ordinance makes no distinction between positive and negative servitudes. The elements that must be proved to obtain a decree are the same in respect of both.

The inaction of the appellant over the act of the respondent in providing windows in his Western wall does not amount to possession by the respondent. His act only gives rise to the inference that he was acting as owner of his own building and not as owner of anything of which the appellant was owner. By exercising his rights over his own land, a person cannot acquire a right over his neighbour's land.

To satisfy the requirements of section 3, possession must be by an adverse title. The mere assertion by one party that another has not got certain rights or that he forbade the other to exercise such rights, even though the other may also acquiesce therein, does not give rise to an adverse title whereon a claim of prescription can be based. Possession in the Ordinance has to be given its ordinary meaning, and the light and air that are enjoyed, because the neighbour has not built higher, cannot be said to be possessed by the land owner who derives therefrom. The opinion we have formed is in accord with the enactment and creates no hardship. In fact, it does away with the hardships that the hitherto reputed view of the Roman-Dutch Law created.

In this connection it is not irrelevant to note that the Law of Scotland does not recognize negative servitudes which are not evidenced by a grant from the servient owner. The following quotation from Erskine's Principles of the Law of Scotland (19th Edn.), page 213, sets out the law—

> " The servitudes (*non aedificandi*), *altius non tollendi*, *et non officiendi luminibus vel prospectui*, restrain proprietors from raising their houses beyond a certain height, or from making any building (at all, or any) that may hurt the light or prospect of the dominant tenement. These servitudes (being negative) cannot be constituted by prescription alone ; for though a proprietor should have built his house ever so low, or should not have built at all upon his grounds for forty years together, he is presumed to have doing so for his own conveniency and profit ; and, therefore, cannot be barred from afterwards building a house on his property, or raising it to what height he pleases, unless he be tied down by his own consent."

Stair puts it even more forcefully when he says—

> " These servitudes of light or prospect cannot be introduced by the enjoyment and use thereof, though time out of mind ; " (Institutions of the Law of Scotland, Vol. I, p. 408).

The inclusion of the word " servitude " in the definition of immovable property in section 2 of the Prescription Ordinance does not have the effect of re-introducing the Roman-Dutch Law of servitudes which it is now settled by the decisions of this Court and of the Privy Council has been replaced by the Prescription Ordinance which requires possession of the type contemplated in the Ordinance for the acquisition of any right in land. It would appear that the words " easement " and " servitude " in the definition have been put in there to remove any doubt that when the Ordinance speaks of immovable property the servitudes that have been acquired in respect of any land or to which it is subject are included. The learned District Judge is in our opinion wrong in holding that the plaintiff is entitled to a decree in his favour.

The order of the learned District Judge is set aside with costs and we direct that the record be sent back so that the trial may proceed.

ABEYESUNDERE, J.
I agree.

Appeal allowed.

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

I. ABDUL RAHIM & OTHERS *vs.* M. D. GUNASENA CORPORATION, LTD.

S.C. 291/1962 (*F*)—*D.C. Colombo*, 49195/*M*.

Argued on : August 25, 26 and 27, 1964.
Decided on : September 16, 1964.

Landlord and tenant—Action to eject tenant on the ground that premises are reasonably required for the purpose of landlord's business—What is the date on which such reasonable requirement must be shown to exist —Rent Restriction Act, section 13 (1) (*c*).

Decision of District Judge on reasonable requirement—Whether final and not appealable,

Held : (1) That in an action for ejectment of a tenant on the ground that the premises are reasonably required for the purpose the landlord's occupation or business, the date at which such reasonable requirement must be shown to exist is the date at which the Court is required to make the ejectment order and not the date of institution of the action.

(2) That the decision of a trial judge as to the question of reasonable requirement within the Rent Restriction Act is an appealable order.

Approved of : *Ismail* v. *Herft*, (1948) 50 N.L.R. 112 ; XL C.L.W. 50.
Andree v. *de Fonseka*, (1950) 51 N.L.R. 213 ; XLI C.L.W. 109.
Aranolis Appuhamy v. *de Alwis*, (1958) 60 N.L.R. 141.
Swamy v. *Gunawardena*, (1958) 61 N.L.R. 85.

Dissented from : *Kader Mohideen* v. *Nagoor Gany*, (1958) 60 N.L.R. 16.

Referred to : *Coplans* v. *The King*, (1947) 2 A.E.R. 393.

[**Editorial Note :**—It might be noted that the case of *Coplans* v. *The King* cited here, has been earlier referred to on this point in a judgment reported in 63 C.L.W. 89. In this latter case, Sansoni, J. also referred to and applied the decision in the later English case of *Piper* v. *Harvey*, (1958) 1 Q.B.D. 439, on the question of the approach by an appellate Court to a trial Judge's decision on reasonable requirement].

G. E. Chitty, Q.C., with *T. Arulananthan* and *E. B. Vannitamby*, for the defendants-appellants.

H. V. Perera, Q.C., with *Desmond Fernando*, for the plaintiff-respondent.

SRI SKANDA RAJAH, J.

The plaintiff-respondent sued the defendants-appellants, its tenants, for ejectment from premises No. 223, Norris Road, Colombo, on the ground that the premises are reasonably required by the plaintiff for the purposes of its business.

The plaint was filed on 1st February, 1960, and the answer on 12th July, 1960. The case was taken up for trial on 18th October, 1960, on which date the Chairman of the plaintiff-corporation, Gunasena, gave part of his evidence-in-chief and the hearing was adjourned for 25th November, 1960, on which date the case was taken off the trial roll for filing amended plaint on 6th December, 1960. Amended answer was filed on 17th January, 1961. The case was then heard on 23rd October, 1961, and other dates. The evidence was concluded on 27th October, 1961, arguments were heard on 27th November, 1961, written submissions tendered on 19th December, 1961, and judgment was reserved for 30th January, 1962 ; but, ultimately delivered on 6th June, 1962.

The amended plaint was necessitated by the plaintiff pleading a further ground for ejecting the defendants, viz., that the defendants had sub-let parts of the premises after they became the plaintiff's tenants. This was a second string to the plaintiff's bow—in the event of the plaintiff failing to prove that the premises are reasonably required for the purposes of its business it could still rely on the ground of sub-letting.

The learned Additional District Judge has held that the plaintiff reasonably requires the premises for the purposes of its business. The appeal is from this finding.

Regarding the alleged sub-letting, he has held against the plaintiff. The evidence regarding sub-letting after the plaintiff became the owner of the premises was so meagre that the learned Judge's finding cannot be said to be wrong. Once this conclusion was reached the need for consideration of the issues of law based on sub-letting did not arise.

Relying on *Coplans* v. *King*, (1947) 2 A.E.R. 393, Mr. Perera, for the respondent, argued that the decision of the District Judge regarding comparative hardship when considering whether or not to make an order for possession within the Rent Restriction Act on the ground of reasonable requirement was final and cannot be made the subject of appeal to this Court. He further argued that once the trial Judge had exercised his discretion and come to a conclusion as regards reasonable requirement his finding would be one of fact and, therefore, final and not subject to appeal.

In England, section 105 of the County Courts Act, 1934, makes the decision of a County Court judge, who hears such cases, on a question of fact, final. There was a similar provision in our Civil Procedure Code regarding the decision on cetrain matters of a Commissioner of Requests, viz., section 833A which has now been repealed by Act 5 of 1964. The extent of the appellate jurisdiction of this Court is contained in section 36 of the Courts Ordinance. It extends " to the correction of errors, in fact, or in law which shall be committed by any District Court ". I would, therefore, hold that Mr. Perera's submissions are untenable.

Mr. Chitty's complaint that the trial Judge's approach to the question of reasonable requirement was wrong and influenced by irrelevant considerations is not without substance. For instance : (1) the judge refers to the defendants as T.R.P. (Temporary Residence Permit) holders ; and (2) to their reply P 2 to the notice to quit as " a defiance suggesting the plaintiff to take their legal remedy " ; (3) he says that " plaintiff's business is a great service to the public " ; and (4) adds that he is " not influenced by quasi-political considerations in this case whether it be for the implemention of the language policy or not. "

These considerations are quite irrelevant for deciding the question of reasonable requirement. One is reminded of the words : " Out of the abundance of the heart the mouth speaketh ".

" What is the date at which the reasonable requirement of the landlord should be shown to exist ? " was a question posed by me to Mr. Perera. Relying on *Kader Mohideen* v. *Nagoor Gany*, 60 N.L.R. 16, he said that it was the date of the institution of the action. In that case Sinnetamby, J., held that " the Court cannot take into consideration events that occur subsequent to the date of action. "

In *Ismail* v. *Herft*, 50 N.L.R. 112, at 116, Windham, J., said, " The time at which the condition set out in section 8 (*c*) of the Rent Restriction Ordinance, No. 60 of 1942 (now section 13 (1), proviso (*c*) of the Rent Restriction Act, 1948), must be shown to exist by a landlord is, I conceive, the time when the Court is required to make the ejectment order. "

In *Andree* v. *Fonseka*, 51 N.L.R. 213, at 214, Gratiaen, J., said, " the reasonableness of the landlord's demand to be restored to possession for the purposes of his business must be proved to exist at the date of the institution of the action and to continue to exist at the time of the trial. "

In *Aranolis Appuhamy* v. *de Alwis*, 60 N.L.R. 141, at 142, Sansoni, J., adopted this view. In his judgment, Sansoni, J., referred to *Ismail* v. *Herft* (*supra*) and *Kader Mohideen* v. *Nagoor Gany* (*supra*) also.

In *Swamy* v. *Gunawardena*, 61 N.L.R. 85, Weerasooriya, J., held that the point of time at which the conditions set out in paragraph (*c*) of the proviso to section 13 of the Rent Restriction Act must be shown to exist is the time when the Court is required to make the ejectment order and not the date of institution of action.

We are in respectful agreement with the view expressed in *Ismail* v. *Herft* ; *Andree* v. *de Fonseka* ; *Aranolis Appuhamy* v. *de Alwis* and *Swami* v. *Gunawardena* (*supra*).

Now I will examine the evidence, oral and documentary, to see if at the time of the judgment in this case the plaintiff's demand to be restored to possession for the purposes of its business was still reasonable, even if it was reasonable at the time of the action.

The plaintiff purchased premises No. 223 in 1956 while the defendants were still in occupation as tenants. They attorned to the plaintiff, who is also owner of the four adjoining premises—

213, 215, 217 and 219. These premises, like 223, have two road frontages, viz., Norris Road on one side and Maliban Street on the opposite side. The plaintiff gave the defendants notice to quit, dated 24th November, 1958, (P 1), adding that action for ejectment will be instituted on failure to comply. By P 2 of 6th December, 1958, the defendants replied pointing out that the plaintiff had already demolished the buildings on 213 and 215 and new buildings were being constructed and was intending to do the same in respect of premises 217 and 219 and, therefore, when all those new buildings were completed the plaintiff will have such spacious premises as would eliminate reasonable requirement. P 2 further stated that the defendants would suffer untold hardship by having to vacate premises 223 and added, " Your clients are entitled to carry out their threats and my clients will seek their legal remedy in reply".— This cannot be construed as a " defiant suggestion. "

Gunasena's evidence given on 23rd October, 1961, reveals, *inter alia :* The four premises 213, 215, 217 and 219 had been completely demolished for erecting a new building consisting of basement accommodation, ground floor and two storeys and the building was nearing completion. At that time plaintiff was in occupation of rented premises, No. 185, Norris Road. Besides, the plaintiff was the owner of 7 and 9, Trinity Place, 128 and 150, Mihindumawatha, 20, San Sebastian Hill, 93/41, Norris Road—total extent being over two and a half acres—From 29th April, 1960, plaintiff became owner of still other premises— 109, 111 (Victoria Hotel premises) and 113, Norris Road, 7, 11, 13, 15, 17 and 19, First Cross Street and 60 and 62, Maliban Street, in extent 34 perches. The plaintiff is also owner of 123, Norris Road, and 72, Maliban Street, where the Wijesiri Hotel is.

His evidence given on 27th October, 1961, shows :—(*a*) application was made by the plaintiff on 13th August, 1960, (v. D 15) to erect a building at Trinity Place for printing and stores (v. plan D 12 *b*) and it was approved on 23rd August, 1961—That plan reveals that the building was to consist of two storeys and the ground floor ; printing (part of the plaintiff's business) is to be carried on there ; provision was made for a total floor-space of 13,129 square feet ; this was the first stage of development ; the second and third stages of development were to be offices (v. site plan in D 15 *b*—(1), (2) and (3)—and the ground area covered by the proposed buildings (2) and (3) being much larger than that by the building (1), which is 3,794 square feet, the first stage of development) ;

(*b*) Application was made by plaintiff on 11th October, 1960, for building a bookshop and offices on 213, 215, 217 and 219, Norris Road (v. D 16, D 16*a*, D 16*b* and D 16*c*) and it was approved on 15th November, 1960. The ground area covered by the building is 7,614 square feet and the total floor-space of all floors is 23,482 square feet. The building consists of a basement, ground floor and two storeys, whereas it consisted of a ground floor only before demolition—*i.e.*, presumably 7,614 square feet. D 16*c* shows that the basement is to be used as stores. Extensive office area is provided for and a restaurant, too. It would appear that these plans were submitted nine months after the institution of this action. Gunasena's evidence on this point is that the plans were made to meet all the plaintiff's requirements at that time, *i.e.*, to meet all the plaintiff's requirements nine months after this action was instituted. This building was about to be completed in about two to four months of 27th October, 1961—That would be between the end of December, 1961, and February, 1962.

It would, therefore, appear that before judgment was delivered in this case the plaintiff had converted premises 213, 215, 217 and 219 into premises with floor-space more than three times the original floor-space.

This aspect of the matter has not been adverted to by the learned Judge. Had he directed his mind to this important aspect instead of to matters completely irrelevant he could not have reached the conclusion he did as regards reasonable requirements, viz., " There is no evidence that the landlord in this case has at his disposal suitable premises which he can without difficulty appropriate for his own use. All that he has got is totally inadequate for his needs. It is not the number of premises he has got but the sufficiency of the premises that has to be considered ".

The new building on 213, 215, 217 and 219, Norris Road, is more than sufficient to meet the plaintiff's requirements for carrying on the business of book-sellers, publishers, stationers and paper merchants.

In examination-in-chief itself Gunasena said that the defendants carry on business in cereals and foodstuffs. Cader's evidence is that the defendants are exporters and importers. Besides,

there were documents produced to show the turnover of the defendant's business. Therefore, it is surprising that the learned Judge said, " One really is in doubt as to what sort of business is done by them (defendants). I have no doubt that the documents D 20, the income tax assessment, is of no avail to the defendants ". The learned Judge appears to have been more concerned with the fact that the defendants are " T.R.P. holders " than with evidence favourable to them.

For these reasons, we would hold that at the time of the judgment in this case the plaintiff's demand to be restored to possession for the purposes of its business was not reasonable. The answer to issue No. 1—Are the premises in suit reasonably required by the plaintiff for the purpose of business within the meaning of section 13 (1) (*c*) of the Rent Restriction Act ?—should be in the negative.

In the result, the appeal is allowed and the plaintiff's action for ejectment is dismissed with costs both here and in the Court below. Rent is payable from 1st November, 1958. Credit should, however, be given to the defendants in respect of remittances, if any, received and accepted by the plaintiff.

ALLES, J.

I agree.

Appeal allowed.

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

In Re HETTIARATCHILLAGE RANASINGHE

S.C. 226/1964—*In Revision, D.C. Kandy, Case No. D.* 1610.

Argued and decided on : July 9th, 1964.

Civil Procedure Code, section 835—*Criminal Procedure Code, sections* 147 (1) (*b*) *and* (*c*), 380—*False evidence in a judicial proceeding—Power of District Judge to remand witness—Penal Code, section* 190.

The petitioner was a witness in a civil proceeding in the District Court of Kandy. While being cross-examined, he contradicted certain items of his earlier evidence, and upon being questioned by the Judge, admitted that the evidence he had given in examination-in-chief was false. Thereupon, the Judge made the following order:—

"I direct the Police to take necessary action with regard to this witness who has given palpably false evidence in this case ; and he states openly without any qualm after taking the oath that he has been tutored by someone to give false evidence. Such conduct would not be tolerated by this Court. I, therefore, remand him to be produced in the Magistrate's Court till the Police take necessary action."

The petitioner moved the Supreme Court to revise the District Judge's order.

Held : That where a District Judge decides to institute proceedings against a witness for giving false evidence, he should act either under section 835 of the Civil Procedure Code or section 380 of the Criminal Procedure Code. He has no power to remand such person indefinitely.

Per TAMBIAH, J. :—"Contempt proceedings must carefully be used because in such cases the accuser and the Judge are one and the same person. It is a matter for regret that the learned District Judge should have made order depriving a citizen of his liberty. It is a very serious matter. I do hope that Judges in future will be very careful when they deal with citizens in cases of this kind. "

Nihal Jayawickrama, for the petitioner.

P. Colin-Thome, Crown Counsel, as *amicus curiae*.

TAMBIAH, J.

In this case the learned District Judge has remanded the petitioner who was a witness in a case without fixing a date on which he had to be produced before the Magistrate. There is specific provision in the Civil Procedure Code, (see section 835), and Criminal Procedure Code, (see section 380), for dealing with cases of this nature. We have gone through the sections carefully and we are of the view that the procedure adopted by the learned District Judge cannot be supported.

Section 835 of the Civil Procedure Code enacts as follows :

"(1) When in a case pending before any Court there appears to the Court sufficient ground for sending for investigation to a Magistrate a charge of any such offence as is described in sections 190, 193, 196, 197, 202, 203, 204, 205, 206, 207, 452, 459, 462, 463, 464, or 466 of the Penal Code, which may be made in the course of any other action or proceeding or with respect to any document offered in evidence in the case, the Court may cause the person accused to be detained till the rising of the Court, and may then or sooner send him in custody to the Magistrate or take sufficient bail for his appearance before the Magistrate. The Court shall send to the Magistrate the evidence and documents relevant to the charge, and may bind over any person to appear and give evidence before such Magistrate."

Section 380 (1) of the Criminal Procedure Code enacts as follows :—

"When any civil or criminal Court other than a Magistrate's Court is of opinion that there is ground for inquiring into any offence referred to in section 147 (1), paragraphs (*b*) and (*c*), committed before it or brought under its notice in the course of a judicial proceeding, such Court may send the case for inquiry or trial to the nearest Magistrate's Court and may send the accused in custody or take sufficient security for his appearance before such Magistrate's Court and may bind over any person to appear and give evidence on such inquiry or trial, and such Magistrate's Court shall thereupon proceed according to law".

It is clear from these provisions that the learned District Judge should have sent the witness before the Magistrate for the Magistrate to assume jurisdiction and deal with the matter. Contempt proceedings must carefully be used because in such cases the accuser and the judge are one and the same person. It is a matter for regret that the learned District Judge should have made this order depriving a citizen of his liberty. It is a very serious matter. I do hope that judges in future will be very careful when they deal with citizens in cases of this kind.

We set aside the order made by the learned District Judge to remand the petitioner. The petitioner should be released by the Fiscal immediately.

We thank the Attorney-General for the assistance he has rendered to this Court in this connection.

SRI SKANDA RAJAH, J.

A part of the learned District Judge's order reads thus : "I, therefore, remand him to be produced in the Magistrate's Court till the police take necessary action". This would indicate that the remanding of the witness is indefinite and that he would be produced before the Magistrate only after the police completed their investigation.

Section 835 (1) of the Civil Procedure Code makes it imperative for the District Judge to have sent the witness in custody to the Magistrate at or before the time he adjourned Court for that day or to take bail for the appearance of the witness before the Magistrate. This he has failed to do. I regret to have to observe that this particular District Judge adopts procedures which are contrary to law.

Set aside.

Present : **Abeyesundere, J., and Sirimane, J.**

SAMUEL *vs.* KUMARAPPA CHETTIAR *et al.*

S.C. No. 100/'61—*D.C.* (*Inty.*) *Kegalle, No.* 8337.

Argued on : 25th and 26th June, 1964.
Decided on : 26th June, 1964.

Vendor and purchaser—Sale of certain lands and undivided shares in others—Failure to get vacant possession of same—Right of purchaser to claim part of purchase price paid—"Incertum juris", meaning of—Time within which action for refund of purchase money for failure to give possession should be brought —Prescription Ordinance, section 6.

The plaintiff bought four allotments of land together with undivided shares in five other lands from the defendant. Being unable to obtain vacant possession thereof, the plaintiff instituted actions against the persons in possession but was unsuccessful in a majority of them. Thereafter he filed this action against his vendor, the defendant, for the recovery of part of the purchase money representing the value of the lands of which he was unable to get possession.

The District Judge dismissed his action on the ground that what was sold was an *incertum juris* and, therefore, the plaintiff was not entitled under the Roman-Dutch Law to recover the purchase price or any part thereof upon his failure to get possession of the properties purchased.

Held : (1) That what had been sold and purchased by the plaintiff was not an *incertum juris*, *i.e.* not an expectation or a hazard, as, for instance, the cast of a net, but a thing itself.

(2) That the plaintiff was entitled to recover such part of the purchase price paid by him as was proportionate to the value of the lands of which he failed to get possession.

(3) That the obligation to deliver vacant possession to the vendee is, in law, an implied part of the written contract of sale and, therefore, the right to claim a refund of the purchase money should be determined by section 6 of the Prescription Ordinance, that is to say, in six years.

Cases referred to : *Silva* v *Silva* (1920) 22 N.L.R. 377
Dawbarn v. *Ryall* (1914) 17 N.L.R. 372

H. W. Jayewardene, Q.C., with *L. C. Seneviratne* and *S. R. de Silva*, for the plaintiff-appellant.

C. R. Gunaratne, for the defendant-respondent.

ABEYESUNDERE, J.

In this case the defendant has sold to the plaintiff four allotments of land and certain undivided shares in five other lands by deed marked P 1, dated 27th August, 1946, for the sum of Rs. 2,900/-. The plaintiff, unable to get vacant possession of the properties he had purchased, instituted actions against the persons in possession thereof for declaration of title and for recovery of possession. He did not succeed in the majority of his actions and he sued the defendant in the present action for the recovery of the sum of Rs. 2,650/-, being the consideration paid to the defendant, less the sum representing the value of the land of which possession had been taken by the plaintiff before this action was instituted. In the course of the trial the plaintiff stated that he obtained possession of another land after the institution of this action and that, therefore, he restricted his claim to the sum of Rs. 2,400/-. He computed this sum on the basis that he could not take possession of seven lands in extent equal to 80 lahas and that the value of a laha was Rs. 30/-. He also stated that when he made his purchase under deed P 1 the sum of Rs. 2,900/-, which was the consideration for the purchase, was determined at the rate of Rs. 30/- per laha. This evidence of the plaintiff was not contradicted by the defendant.

The learned District Judge who tried this action dismissed it on the ground that what was sold was an *incertum juris* and that, therefore, under the Roman-Dutch Law the purchaser was not entitled to recover the purchase price or any part thereof upon his failure to get possession of the property purchased. The plaintiff has appealed from the judgment and decree of the learned District Judge.

The sale of an *incertum juris* is dealt with in Book XXI, Title 2, section 31 of Voet's Commentary on the Pandects (Gane's translation, Volume 3, page 686). To determine the nature of the *incertum juris* referred to in the said section 31, reference may be made to Book XVIII, Title 1, section 13, of the said Commentary where the things that may be sold are classified and discussed by Voet. In that section Voet makes the following observation :—" . . . for it has been held that there can also be a purchase of an expectation, a hazard and the cast of a net, so that the expectation takes the place of the thing ". The *incertum juris* referred to by Voet is what Justinian in the *Digest* calls the *incertum rei* (Digest XVIII, Title 4, section 11). In the present case what has been sold and purchased is not an expectation or a hazard as, for instance, the cast of a net, but a thing itself. Voet also discusses the question of the sale of a thing as distinguished from the sale of the uncertainty of a right. In

Book XXI, Title 2, section 31, of his Commentary Voet states as follows :—" But if when the seller was selling not the uncertainty of his right but simply the thing, he expressly arranged ' not to be held liable for eviction ', he is not, indeed, forced when the thing is evicted to pay damages ; unless in this case also he knowingly sold what was another's. But he is nevertheless fast bound to restore the price received, because a *bonae fidei* contract does not admit of the covenant that the purchaser should lose the thing and the seller should keep the price ". It is relevant to the matter I am considering now to quote the following views of Voet in regard to the case where a buyer knowingly buys a *res aliena* :—" In this connection it should be broadly noted that he who has knowingly bought a thing which was not the vendor's has, indeed, no action for damages on eviction, unless he has specially taken care that security for eviction is given him ; but that nevertheless the knowledge in the purchaser that the thing was another's does not prevent his recovering, when eviction has ensued, the price which he gave. It is not fair that the seller should be enriched to the loss of the purchaser ". (Book XXI, Title 2, section 32).

In accordance with the aforementioned views of Voet, this Court has held in the case of *Silva* v. *Silva*, (22 N.L.R., p. 377), that even where a purchaser knew that the vendor had a disputed title and bought the land on speculation, he is entitled to recover the price actually paid by him to the vendor but is not entitled to recover damages.

I, therefore, hold that the plaintiff is entitled to recover such part of the purchase price paid by him as is proportionate to the value of the lands of which he has failed to get possession. I accept the evidence of the plaintiff in regard to the value of the lands of which he has been unsuccessful in obtaining possession. I hold that he is entitled to recover the sum of Rs. 2,400/-.

The defendant has filed objections to the decree of the learned District Judge on the ground that the learned District Judge should have answered in favour of the defendant the issue relating to prescription. Mr. C. R. Gunaratne, Advocate, appearing for the defendant, argued that the cause of action for the recovery of part of the purchase price paid by the plaintiff arose on the date of the execution of the deed P 1. He contended that the obligation to deliver vacant possession was imposed on the vendor, namely, the defendant, not by the deed P 1 but by the common law and that, therefore, the period of prescription was three years as provided in section 10 of the Prescription Ordinance.

I do not agree with this view of Mr. Gunaratne. The vendor's obligation to deliver vacant possession to the vendee is, in law, an implied part of the written contract of sale and, therefore, the period of prescription should be determined by reference to section 6 of the Prescription Ordinance. The said section 6 specifies a period of six years. I find support for my view in the decision of this Court in the case of *Dawbarn* v. *Ryall*, 17 N.L.R., p. 372. That decision is one of the Full Bench. In that case Lascelles, C.J., expresses the following view :—" The circumstance that the obligation on the part of the seller to give quiet possession of the thing sold depends upon a condition which the law considers as inherent in a written contract of sale does not make that obligation any the less dependent on the written contract of sale. Without the written contract of sale this obligation would not exist, and such an obligation, in a case where immovable property is concerned, would not be proved without production of a formal written contract of sale ".

The learned District Judge is, therefore, correct in holding that the action of the plaintiff is not prescribed. Consequently I dismiss the objections of the defendant to the decree entered by the learned District Judge.

I set aside the judgment and decree of the learned District Judge and enter judgment for the plaintiff in a sum of Rs. 2,400/-. The plaintiff is entitled to the costs of the action and also the costs of this appeal.

SIRIMANE, J

I agree

Appeal allowed.

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

ALAGAN *vs.* APPUHAMY*

S.C. 942/1963—*M.C. Badulla, No.* 38450.

Argued and decided on : 3rd June, 1964.

Penal Code, section 315—*Charge of voluntarily causing hurt with an axe—Conviction of accused—Adequacy of sentence of two weeks' imprisonment.*

Criminal Procedure Code, section 335—*Appeal with leave of Court only—Need to give reasons for granting leave to appeal.*

Held : That leave to appeal under section 353 of the Criminal Procedure Code should not be given lightly. Reasons must be given for granting such leave.

Per SRI SKANDA RAJAH, J.—"In my opinion, the use of an axe, which would have ended far more seriously than it actually did, had not the complainant tried to ward off the blow, calls for a deterrent sentence ".

Nimal Senanayake with *Bala Nadarajah*, for the accused-appellant.

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

SRI SKANDA RAJAH, J.

The accused was charged with voluntarily causing hurt with an axe by cutting the complainant—an offence punishable under section 315 of the Penal Code. The complainant gave evidence regarding the incident and his evidence was that this accused aimed a deliberate cut at him, he attempted to ward it off but sustained an injury on the middle of his fore-arm. The evidence of the complainant is also to the effect that when the accused used the axe, he said, " You die ".

The Village Headman to whom the complaint had been made was the person who filed the plaint in the Magistrate's Court. It was suggested to him that he had an axe to grind. That has been rejected by the learned Magistrate.

The accused's version was that the complainant's father, Suppiah, went with an axe to cut the accused and while Suppiah and the accused were struggling for the axe the complainant came and aimed a blow with his hand at the accused and accidentally the complainant's forearm alighted on the axe. This has been rejected by the learned Magistrate. In my view he was entitled to do so because this was a fantastic defence.

Having convicted the accused rightly the Magistrate imposed a sentence of two week's rigorous imprisonment, may be on the footing that an injury, with axe, 1 in. deep deserves one week's imprisonment and if it was 2 in. deep it should be two weeks.

I am reminded of the fact that this is the Magistrate whose decision came up before this Court on the 8th May, 1964, in S.C. 240, M.C., Bandarawela, No. 38048. In that case, a clear case of attempted murder had been converted into one of voluntarily causing simple hurt—an offence punishable under section 314, and the Magistrate imposed a manifestly inadequate sentence of one and a half months. This Court had occasion to set aside that order and send the case back for non-summary proceedings to be taken.

These light punishments can be explained only on one footing, namely, the Magistrates hope and believe that such cases will not be appealed from and would not, therefore, be brought to the notice of this Court.

As I have already stated I have no reason to interfere with the conviction.

Under the provisions of section 335 of the Criminal Procedure Code when a sentence like this is imposed there is no right of appeal, " without the leave of the Court in which the conviction was had ". I find that before the petition of appeal was filed on the 20th September, 1963, the Proctor for the accused moved for leave to appeal and the Magistrate made the following order :

* For Sinhala translation, see Sinhala section, Vol. 8 part 7, p. 23

" Allowed. Accept petition of appeal when filed". It shows that the Magistrate acted on the footing : " Ask and it shall be given ". He did not give any reason for granting leave. Learned Counsel for the appellant submitted that the Petition of Appeal must have been seen by the Magistrate. There is nothing in the record to indicate that the Magistrate had seen the petition of appeal before he granted leave to appeal. On the contrary his order, " accept petition of appeal when filed ", would show that at that stage the petition of appeal had not been tendered. The next journal entry, also of the same date, shows that the petition of appeal was tendered later.

I would like to point out that leave to appeal should not be granted lightly. Reasons must be given for granting such leave. Otherwise one might get the impression that the Magistrate was not sure in his mind about the conviction. But, in this case, this Court is quite satisfied that the conviction was on very good grounds.

It now remains for this Court to consider whether the sentence passed in this case was adequate. In my opinion, the use of an axe, which would have ended far more seriously than it actually did had not the complainant tried to ward off the blow, calls for a deterrent sentence. The sentence that had been imposed is manifestly inadequate. I enhance the sentence to six (6) months' rigorous imprisonment.

Appeal dismissed.
Sentence enhanced.

Present : **Herat, J., and Abeyesundere, J.**

THE PUBLIC TRUSTEE *vs.* S. M. A. CADER

S.C. 111/'62—*D.C.* (*Inty.*) *Trincomalee*, 6934/*T.*

Argued and decided on : March 18, 1963.

Courts Ordinance, section 86—*Availability of an injunction thereunder against an employee after employment terminated—Legal possession of business premises always to be in employer.*

Administration of estates—Rights of heirs to be always subject to administrator's over-riding power to utilise assets to best advantage of estate.

Held : (1) That where an employee wilfully continues to remain in control of a place of business, the administrator of the deceased owner's estate has a right to an interim injunction under section 86 of the Courts Ordinance restraining that employee from continuing in control.

(2) That the rights which accrue to the heirs in respect of the estate of a deceased dying intestate are subject to the over-riding power of the administrator of that estate in utilising the assets to the best advantage of the estate.

(3) That in the present case, as the legal relationship between the owner of the ice-plant and its manager was purely that of employer and employee, legal possession of the plant, even though constructive, continued always to be with the owner.

Distinguished : *Pounds, et al.* v. *Ganegama*, 40 N.L.R. 43 ; XI C.L.W. 111.

H. V. Perera, Q.C., with *M. Tiruchelvam, Q.C.*, *K. Thevarajah* and *N. E. Weerasooria*, (*Jnr.*), for the plaintiff-appellant.

S. Sharvananda with *M. T. M. Sivardeen*, for the defendant-respondent.

HERAT, J.

One Rasool died leaving as one of the assets of his intestate estate an ice-making factory. It transpires from the evidence in the case that one Assanar Lebbe, an heir of Rasool, appointed during his life-time the present defendant-respondent to be the manager of this ice-plant. An Administrator had been appointed to Rasool's estate. After sometime Assanar Lebbe died and the present defendant-respondent and his wife, as heirs of Assanar Lebbe, became entitled through Assanar Lebbe to certain shares in Rasool's estate. The defendant-respondent seems to have continued as manager of the ice-plant even after Assanar Lebbe's death.

When the original administrator of Rasool's estate ceased to function as administrator leaving the administration of Rasool's estate incomplete

the Court appointed the plaintiff-appellant who is the Public Trustee of Ceylon as administrator *de bonis non administratis* in respect of Rasool's estate. After the plaintiff-appellant was appointed administrator *de bonis non* he appointed the defendant-respondent as manager under him of the ice-making factory. This question as to whether the defendant-respondent was appointed as Manager and employed as such by the plaintiff-appellant was one of the matters in issue in the Court below and the learned District Judge has arrived at a finding of fact in favour of the plaintiff-appellant that the defendant-respondent was so employed by the plaintiff-appellant. There is nothing urged before us which inclines us to disturb that finding of fact.

In these proceedings the plaintiff-appellant as administrator sued the defendant-respondent in the following circumstances :—The plaint averred that because of certain unsatisfactory conduct on the part of the defendant-respondent in regard to his management of the factory in question and also because the defendant-respondent had failed to account to the plaintiff-appellant in respect of receipts and disbursements for the period stated in the plaint the plaintiff-appellant terminated his services as manager of the factory and in the plaint he asked for an accounting and also for an injunction restraining the defendant-respondent from interfering generally in the working of the ice-plant. Pending the hearing of that action the plaintiff-appellant asked that the defendant-respondent be restrained by an interim injunction from managing the ice-plant or otherwise interfering with the working of the ice-plant by the plaintiff-appellant or his agents. Upon this application an *ex-parte* order was made by the learned District Judge granting an interim injunction. When notice of this interim injunction was served upon the defendant-respondent he applied to Court to have it dissolved.

The matter of the application for dissolution of the interim injunction went into inquiry and the learned District Judge after holding that the defendant-respondent had been employed as manager by the plaintiff-appellant and that such employment had been terminated, dissolved the interim injunction because he thought that the terms in which the interim injunction was sought involved a dispossession of the defendant-respondent from the ice-plant or factory and that in the learned District Judge's view section 86 of the Courts Ordinance under which the application was made did not confer jurisdiction on the Court to grant an interim injunction where the effect of doing so would be to eject the defendant-respondent from the subject-matter of the application. From the order dissolving the interim injunction the plaintiff-appellant has now appealed. In our view, the learned District Judge was wrong in refusing the application of the plaintiff-appellant.

In his plaint the plaintiff-appellant had averred that he was the administrator. The ice-plant was one of the assets of the estate of which the plaintiff-appellant had been appointed administrator. The business of manufacturing ice in that ice-plant was part of the estate of Rasool and in our view, a duly appointed administrator had every right to manage and run that business for purposes of administration in the interests of all the heirs and creditors of the estate. It is true that under our law the title to all movable as well as immovable property belonging to a deceased vests upon death of that deceased in his legal heirs but this vesting is subject to the over-riding power of the legal representative which includes an administrator, to utilise the assets for purposes of administration and one of these purposes of administration would be to see that a going-concern like an ice-making factory is run efficiently so that it may be so run and either wound-up as a going concern to the best advantage of the estate or be ultimately distributed among the heirs in the most favourable position. For that purpose, in our view, an administrator has an undoubted legal right and power to manage the business and run it as efficiently as he thinks fit. In these circumstances, it is our opinion that the plaintiff-appellant was entitled as administrator to administer and run the ice-making factory and in doing so was entitled to appoint the defendant-respondent as its manager. The plaintiff-appellant was also entitled to terminate that employment for good grounds and once that employment was terminated it was within the plaintiff-appellant's right to see that the defendant-respondent was effectively removed from all rights of managership and interference with the

business. The defendant-respondent's persistence in continuing definitely to go on with the managership despite his discontinuance, in our view constituted an act done in violation of the plaintiff-appellant's rights and against such an act, in our view, the plaintiff-appellant was entitled to come under section 86 of the Courts Ordinance and ask for protection by way of an injunction against threatened loss and damage.

The learned District Judge purported to follow the judgment of Mr. Justice Koch in a case reported in 40 N.L.R., page 73. With respect to the view taken by Mr. Justice Koch in that case we think the decision in that case could be distinguished upon the facts which came up for decision there because those facts are entirely different from the facts in this particular case. In the instant case once we accept the finding of fact that the legal relationship between the plaintiff-appellant and the defendant-respondent was that of employer and employee which had been duly terminated the resulting position is that during the defendant-respondent's employment as manager he had no legal possession of the premises ; he had only mere *de facto* control. Legal possession, constructive though it may be, continued always to be with the administrator, namely, the plaintiff-appellant and never left the plaintiff-appellant. Therefore, by granting an injunction in favour of the plaintiff-appellant even by way of an interim injunction there is no involvement of the dispossession of the defendant-respondent. It is merely a protection of the plaintiff-appellant's possession which the plaintiff-appellant already had.

In the case dealt with by Mr. Justice Koch the person against whom the injunction was sought, according to the averment of the applicants for the injunction, was an employee, but there the respondent took up the position that he was not an employee at all and that he held and possessed the business entirely on his own right. There was no finding of fact such as we have in the instant case that the respondent in that case was truly an employee and perhaps, that factor that the respondent was claiming to possess on his own right and was, in fact, in possession on his own behalf weighed with the learned Judges who decided that case coming to the view that the respondent in that case could not be dispossessed by way of an injunction.

For the reasons set out above, we think that that case can be distinguished from the instant case. We, therefore, set aside the order appealed from and grant the plaintiff-appellant an interim injunction in terms of his prayer in the petition for an interim injunction, dated 25th May, 1962. We also grant the plaintiff-appellant costs of this appeal as well as the costs of inquiry in the Court of first instance.

Before we dispose of this appeal we wish to refer to one other matter. In the course of the inquiry arising out of these proceedings the then Public Trustee, Mr. V. F. Gunaratne, had given evidence. Necessarily Mr. Gunaratne as the head of a large public department had to speak by reference to the relevant files. The learned District Judge, after Mr. Gunaratne had given evidence whilst perusing these files had come across some endorsement made therein referring to some question of tenders in respect of a lease of the ice-factory in question. In the course of his order the learned District Judge has made some remarks on the fact that some tenders had been received at Mr. Gunaratne's bungalow. As the learned District Judge himself remarks he had no opportunity of giving Mr. Gunaratne any opportunity of explaining matters and the learned District Judge candidly admits that his observations are entirely speculative. Whatever that may be, we think it very unfortunate that the learned District Judge should have made any remarks whatsoever particularly as Mr. Gunaratne had been given no opportunity of rendering any explanation. There is an affidavit subsequently filed by Mr. Gunaratne in these proceedings which entirely satisfies us that everything done was done in a perfectly straightforward way. The tenders in question were delivered at the bungalow as it is a customary practice when an office is closed and on a Sunday or Public Holiday for important urgent correspondence to be delivered at the private residence of the Head of the Department.

ABEYESUNDERE, J.

I agree.

Appeal allowed.

Present : **Basnayake, C.J., and Sirimane, J.**

HASSAN, SON OF MOHIDEEN *vs.* ROMANISHAMY

S.C. No. 388/61—*D.C. Badulla, No. L.* 66.

Argued and decided on : May 7, 1964.

Prescription Ordinance, section 3—*Prescriptive possession—How may it be proved.*

Held : That mere statements of a witness, " I possessed the land " or " we possessed the land and " I planted plantain bushes and also vegetables ", are not sufficient to entitle him to a decree under section 3 of the Prescription Ordinance, nor is the fact of payment of rates by itself proof of possession for the purposes of this section.

Case referred to : *Alwis* v. *Perera* (1919) 21 N.L.R. 321.

H. W. Jayewardene, Q.C., with *Bala Nadarajah*, for the defendant-appellant.

C. D. S. Siriwardene with (*Miss*) *A. P. Abeyratna*, for the plaintiff-respondent.

BASNAYAKE, C.J.

The plaintiff prays that he be declared entitled to the land described in the schedule to the plaint. He relies on deed of transfer, No. 504, dated 1st August, 1934, in support of his claim. He also claims that he is entitled to the land by virtue of undisturbed and uninterrupted adverse possession for a period well over 30 years. The evidence as given by the plaintiff is as follows :—

" I bought this land in 1934. Till 1940 this land was possessed by Simon Appu. After that I possessed this land. I paid the taxes in the name of Simon Appu. Simon Appu died about 30 years ago. Simon Appu used to plant plantain bushes and also vegetables. I also planted plantain bushes and also vegetables. There is water close to this land. I know this defendant and his father and relations."

On that evidence the learned District Judge has based his conclusion that there was undisturbed and uninterrupted adverse possession by the plaintiff for 10 years prior to the date of instituting his action.

It is not sufficient for a witness to say, " I possessed " or " We possessed ". He must testify to the acts done by him so that the Court may decide whether those acts prove adverse possession in law. In the case of *Alwis* v. *Perera*, 21 N.L.R. 321, Bertram, C.J., expressed the view that when a witness says, " I possessed " or " We possessed ", or " We took the produce ", the District Judges should not confine themselves merely to recording the words, but should insist on those words being explained and exemplified.

In the instant case, too, the learned District Judge has not asked the witness to explain or exemplify his statement, " I possessed this land ". His statement, " I planted plantain bushes and vegetables ", is not sufficient to entitle the plaintiff to a decree under section 3. The payment of rates is by itself not proof of possession for the purpose of section 3, for rates can be tendered by a tenant or one occupying any premises with the leave and licence of the owner or by any other person. In the instant case, though the plaintiff says that he was paying rates in the name of Simon, there is, in fact, evidence that he obtained a transfer of the premises.

The judgment of the learned District Judge is, therefore, set aside, and the plaintiff's action is dismissed with costs both here and below.

SIRIMANE, J.

I agree.

Appeal allowed.

END OF VOLUME LXVI

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තීන්දුව : කැඳවීම් නියෝගයක් නොමැතිව විත්තිකරුවෙකු උසාවිය ඉදිරියට පමුණුවනු ලැබූ කල්හි එසේ කළ පොලිස් නිලධාරියාව එම දින-යේම දිවුරුම් පිට පරීක්ෂා කිරීමට මහේස්ත්‍රාත්-වරයා විසින් අතපසු කර තිබීම අපරාධ නඩු විධාන සංග්‍රහයේ 151 (2) වන ඡේදයේ නියමය අනුව පරීක්ෂණයක් පැවැත්වීමට අතපසු කළ ලෙස සැලකිය යුතු නිසා ඉන් පසුව ගත් සෑම පියවරක්ම අවලංගු විය යුතු ය.

''අපරාධ නඩු විධාන සංග්‍රහයේ 304, 325 (1) (බී), 338 (1) වැනි ඡේද—කොන්දේසි සහිතව නිදහස් කිරීම—යහපත් කල්ක්‍රියාවෙන් සිටීමට විත්තිකරුගේ ඇප බැඳීම.

තීන්දුව : යම්කිසි විත්තිකරුවෙකු අපරාධ නඩු විධාන සංග්‍රහයේ 325 (1) (බී) වැනි ඡේදය යටතේ යහපත් කල්ක්‍රියාවෙන් පැවතිය යුතු යයි ද, අණ කළ විටක වරදකරුවකු ලෙස තීන්දු කරනු ලැබීමටත් දඩුවම් පැමිණ වීමටත් පෙනී සිටිය යුතු යයි ද නියෝග කළ කල්හි එම නියෝගය මහේස්ත්‍රාත් උසාවියේ ''නඩු තීන්දුවක්'' හෝ ''අවසාන නියෝගයක්'' නො වන්නේ ය. මේ අනුව එවැනි නියෝගයකට විරුඬව ඇපැල් ගැනීමට අයිතිවාසිකමක් ද නොමැත.

අපරාධ නඩු විධාන සංග්‍රහයේ 335 වන ඡේදය—දණ්ඩ නීති සංග්‍රහය''—යට බලන්න.

අපරාධ නඩු විධාන සංග්‍රහය, 114 වන ඡේදය—මහජන පීඩාව (Public Nuisance) ගම් කාර්‍ය සභාපති විසින් මහජන පීඩා ක්‍රියාවක් නැවැත්-වීමට කරණ ලද ඉල්ලීමක්.

වැසිකිලි කැලි-කසල එක්තරා ස්ථානයක දැමීමට ගම්කාර්‍ය සභාව පුරුදුව සිටි නමුත් එසේ වැඩි දුරටත් කරගෙන යෑමට එම ස්ථානයෙහි අසල්-වැසියෙක් වූ වගඋත්තරකරු අවහිර කළා යයි ද, ඔහුගේ එම ක්‍රියාව මහජන පීඩාවක් ලෙස සැලකිය හැකි යයි ද කියා එසේ අවහිර කිරීමෙන් වැලැක්-වීම පිණිස අපරාධ නඩු විධාන සංග්‍රහයේ 114 වෙනි ඡේදය අනුව නියෝගයක් ලබා ගැනීමට පලාත් පාලන ආයතනයකට අයිතියක් නැත. ඔහු එසේ කරවීම වගඋත්තරකරුවන්ට කරන පීඩාවකි.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා විසින්:—''අපරාධ නඩු විධාන සංග්‍රහයේ 114 වන ඡේදයට අනුව ක්‍රියා කිරීමට අදහස් කර ඇත්තේ ඉතාම හදිසි මහජන පීඩාවක් මතු වූ කලක ය. එම ඡේදයට අනුව දෙනු ලබන නියෝගයක් දින 14 කට අධික කාල සීමාවක් තුළ බලපවත්නේ නැත''.

අපරාධ නඩු විධාන සංග්‍රහය

අපරාධ නඩු විධාන සංග්‍රහය, 325 ඡේදය—දණ්ඩනීති සංග්‍රහයේ 367, 394 වන ඡේද—විත්තිකරුවකු විසින් මොටෝරිය දෙකක් සොරකම් කරණ ලදැයි කියා හෝ එසේ නැතහොත් එම මොටෝ රිය සොර බඩු වශයෙන් තමා ළඟ තබා ගන්නා ලදැයි කියා හෝ ඔහුට විරුඬව චෝදනා ඉදිරිපත් කළ විට එම ඡේදයේ පිටුවහල සෙවිය හැකිද?—විත්තිකරු තමා වරදකරු යයි කියා සිටීම—දෙන ලද දඬුවමෙහි අප්‍රමාණවත්කම—විත්තිකරුට විරුඬව ඇති පිළිගත හැකි සාක්ෂි මහේස්-ත්‍රාත්වරයා කල්පනාවට නො ගැනීම—දඬුවම් දීමේදී විනිසුකරු විසින් කල්පනාවට භාජන කළ යුතු කරුණු—පහළ උසාවිවල නඩු විභාග සඳහන් වාර්තා සිය කැමැත්තෙන් ම ගෙන්වා පරීක්ෂා කිරීමට ශ්‍රේෂ්ඨාධිකරණයට ඇති බලය.

මොටෝ රිය දෙකක් සොරකම් කරණ ලදැයි කියා හෝ එසේ නැත්නම් හොර බඩු තමා ළඟ තබා ගන්නා ලදැයි කියා විත්තිකරුට විරුඬව

කොළඹ ඒකාබද්ධ මහේස්ත්‍රාත් උසාවියේ නොː 27178 සහ නොː 27374 යන නඩු දෙකක් පවරණ ලදී.

පළමු වන නඩුවට හේතු භූත වූයේ රුː 10,000!- ක් වටිනා නොː 2 ශ්‍රී 6014 දරණ මොටෝ රියක් කොළඹින් 11.2.1963 වන දින සොරකම් කරණු ලැබීම ය. චිත්තිකරු නෝර්ටන් බ්‍රිජ්හි දී 31.3.63 වන දින එම මොටෝ රිය 3 ශ්‍රී 8694 දරණ නොම්මර නහඩුව ඇතුව පදවා ගන යන බව සහ ඔහුගේ එම කාරයේ බඩු පෙට්ටියේ ඊ ඇන් 9804 දරණ තවත් නොම්මර නහඩු දෙකක් ඇති බව ද අසුවී තිබේ. චිත්තිකරු උසාවියට ඉදිරිපත් කරණ ලදුව 16.4.63 වන දින රුː 3,000!- ක් සහතික ඇපයක් පිට නිදහස් කරණ ලදී.

දෙවන නඩුවට හේතු භූත වූයේ චිත්තිකරුට ඇප දී සදිනකට පසු 22.4.63 දරණ දින කොළඹ කොටුවෙන් 1 ශ්‍රී 8439 දරණ රුː 10,000!- ක් වටිනා රියක් සොරකම් කිරීම ය. ලබන ලද යම් කිසි ඔත්තුවක් අනුව පොලීසිය බොරැල්ලේ සැහවී සිට එම මොටෝ රිය ගරාජයකින් චිත්තිකරු විසින් පදවා එලියට ගැනීමේදී 24.5.63 දින අල්ලා ගන්නා ලදී. චිත්තිකරු මොටෝ රිය සොරකම් කරණ ලද දිනයන් සඳහන් කරණ ලද දින පොතක් මොටෝ රිය ඇතුලේ තිබී පොලීසියට අසුවිය.

දෙවෙනි නඩුවේ දී තම භාර්‍යාව ඇපකාරිය හැටියට භාරගෙන රුː 500!- ක ඇපයක් පිට චිත්තිකරු මුදා හරින ලදී.

වසී 1963.8.6 දරණ දින එම නඩු දෙකම මහේස්ත්‍රාත්වරයා ඉදිරියට එළඹිනි. අපරාධ නඩු විධාන සංග්‍රහයේ 152 (3) ඡේදය යටතේ මහේස්ත්‍රාත්තුමා දිස්ත්‍රික් නඩුකාරතුමෙකු වශයෙන් ආඥා බලය තමා පිට පවරා ගෙන තිබුනි. කලින් තමා නිවැරදිකරු යයි සැලකර සිටි චිත්තිකරු එම සැලකිරීම ඉවත් කොට ගෙන මෙහි දී නඩු දෙකටම තමා වරදකරු බැව් කියා සිටියේ ය. මෙසේ සැලකර සිටීම සොර බඩු තමා ළඟ තබා ගෙන සිටීමේ චෝදනා වලට වැරදිකරු බව පිළිගත් හැටියට සැලකිරීමකැයි සලකා ගත් මහේස්ත්‍රාත්වරයා එසේ කර ඇත්තේ මේ මොටෝ රිය සොර බඩු බව පිළිගත් නිසා හෝ එසේ පිළිගැනීමට කරුණු තිබුනු නිසා ය. ඉක්බිති චිත්තිකරු හඳුනා ගැනීම හා දඬුවම් දීම මහේස්ත්‍රාත්වරයා 9.8.63 දිනට කල් දැමී ය. මේ දිනට ලැබෙන ලෙස ඔහු පරිවාසක නිලධාරියාගෙන් වාර්තාවක් ද ඉල්ලීය.

චිත්තිකරුට හිතකර නොවන සටහන් ඇතුළත් ව තිබූ එම වාර්තාවෙහි චිත්තිකරු පරිවාස ආරක්ෂාව යටතේ තැබීම මැනවැයි මේ පරිවාසක නිලධාරියා නොකී නමුත් මහේස්ත්‍රාත්වරයා චිත්තිකරු පිළිබඳ ව අපරාධ නඩුවිධාන සංග්‍රහයේ 325 වන ඡේදයට අනුව ක්‍රියා කිරීමට සැරසුනේ ය. එම වාර්තාවේ සඳහන් වී ඇති පරිදි ''චිත්තිකරුට හයින් ජීවත් වන ඔහුගේ භාර්‍යාව මහේස්ත්‍රාත්වරයා ඇපකාරිය හැටියට පිළිගෙන රුː 500!- ක ඇපයක් පිට ඉන්පසු හොඳ කල්ක්‍රියාවෙන් සිටින ලෙස තුන් අවුරුද්දකට චිත්තිකරුගේ ඇහ බැන්දේ ය. පළමු වන නඩුවේ රජයේ ගාස්තුව වශයෙන් මසකට රුː 20!- බැගින් ගෙවෙන හැටියට රුː 250!- ක් ගෙවිය යුතු යයි චිත්තිකරුට නියම කළ මහේස්ත්‍රාත්තුමා දෙවන නඩුවට ද රජයේ ගාස්තු වශයෙන් මසකට රුː 5!- බැගින් ගෙවෙන සේ රුː 100!- ක් නියම කෙළේ ය.

ශ්‍රේෂ්ඨාධිකරණය මෙම නඩු දෙකේ නඩු පොත් සිය කැමැත්තෙන් ම ගෙන්වා එම අධිකරණය වෙත අපරාධ නඩු විධාන සංග්‍රහයේ 356 වන ඡේදයෙන් පැණවී ඇති බලය පිට පහත සඳහන් තීන්දුව දුන්නේ ය '—

තීන්දුව : (1) (ඒ) චිත්තිකරුට විරුඬව ඉදිරිපත් කර ඇති චෝදනාව සුළු වරදක් පිළිබඳව නොවන නිසාත්; (බී) මෙම මොටෝ රිය සොරකම් කරණ ලද්දේ චිත්තිකරු විසින් යයි පිළිගත හැකි සාක්ෂි තිබුන නිසාත්; (සී) පරිවාසක නිලධාරියාගේ වාර්තාවෙන් මේවා අපරාධ නඩු විධාන සංග්‍රහයේ 325 ඡේදය යටතේ ක්‍රියා කිරීමට සුදුසු නඩු නොවන බව පෙනී යන නිසාත්; මේ එක් එක් නඩුවක සොරකම් කිරීමේ වරදට චිත්තිකරුට අවුරුදු දෙක බැගින් සිරදඬුවම් අපරාධ නීති සංග්‍රහයේ 367 වන ඡේදය යටතේ දිය යුතුව තිබේ. දෙවන නඩුවේ දඬුවම පටන් ගන්නේ පළමු වෙනි නඩුවේ දඬුවම ගෙවී අවසාන වූ පසුව ය.

(2) ගරුක අපරාධ පිළිබඳව අපරාධ නඩුවිධාන සංග්‍රහයේ 325 වන ඡේදයේ පැණවීම් අදාළ නොවේ.

(3) දෙවෙනි නඩුවේ චිත්තිකරුට ඇප දීමේදී මහේස්ත්‍රාත්තුමා තමා සතු අභිමතිය කිසිසේත් සලකා බැලුවේ නැත. එහෙමණක් නොව 367

සහ 394 ඡේදයන්හි සඳහන් අපරාධ පිළිබඳව ඇප දීමක් නො කළ හැකි බව ද ඔහු අවබෝධ කර ගෙන නැත.

දඩුවම් දීමෙහිදී විනිශ්චයකරුවන් විසින් කල්පනාවට ගත යුතු කුමන කරුණු දැයි විනිශ්චයකාරතුමා පහත සඳහන් පරිදි පෙන්වා දුන්නේ ය :—

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා :— " දඩුවමක් දීමේදී විනිසකරුවන් විසින් කල්පනාවට ගත යුතු කරුණු මොනවා ද යන්න පෙන්වා දීමට ද මම කැමැත්තෙමි. මේ සඳහා ඇටෝර්නි-ජනරාල්වරයා එ. එච්. ඇන්. ද සිල්වා, 57 න.නී.වා. 121 වන පිටේ ඇති නඩුවෙන් කරුණු උපුටා දැක්වීමට මා සූදානම් ය. එම නඩු වාර්තාවෙහි 124 වන පිටේ ගරු බස්නායක වැඩ බලන අග්‍රවිනිශ්චයකාරතුමා (එතුමා එවකට සිටි පරිදි) මෙසේ කියා තිබේ : ' වරදකරුවෙකුට දඩුවම් පමුණුවන දඩුවමේ තත්ඛය සැලකීමේදී එම දඩුවම මහජනතාව පිළිබඳ අංශයෙන් සහ වරදකරුගේ අංශයෙන් යන අංශ දෙකින් ම සළකා බැලිය යුතු ය. බොහෝ විට විනිසකරුවෝ මෙම ප්‍රශ්නය වරදකරුගේ අංශයෙන් පමණක් බැලීමට කැමත්තහ. සුදුසු දඩුවම තීරණය කිරීමෙහිදී විනිසකරුවෙකු විසින් වරදකරු කරන ලද වැරදි ක්‍රියාවක ස්වභාවය අනුවම එහි ඇති බරපතල කම ගැන සලකා චෝදිතයාට විරුද්ධව චෝදනා ඉදිරිපත් කරන ලද හෝ දණ්ඩ නීති සංග්‍රහයෙහි හෝ වෙනත් ආඥා පණතක පනවා ඇති දඩුවම් ගැන ද කල්පනාවට ගත යුතු ය.

(2) : විනිසකරුවා විසින් දෙනු ලබන එම දඩුවම නිවර්තක (deterrent) දණ්ඩනයක් ලෙස බලපවත්වා ද යන්න ගැන සලකා එය කොතරම් දුරට ක්‍රියාකාරී වේද යන්න ද සිතා ගත යුතු ය.

(3) : චෝදිතයා වරදකරු හැටියට විනිශ්චය වී ඇති අපරාධයෙහි ස්වභාවය ගැන සලකා එ බඳු අපරාධ කෙතරම් තත්ඛයක සමාජයේ කෙරේ ද යන්න ද ඔහු විසින් සැලකිය යුතු ය.

(4) : එ බඳු අපරාධකරුවන් අල්ලා ගැනීමෙහි ඇති දුෂ්කරතාවය ද විනිසකරුගේ අවධානය යොමු විය යුතු කරුණකි. අපරාධකරුවාගේ චරිත ශෝධනය ද වැදගත් කරුණක් ලෙස නිසැකයෙන් ම සළකා ගත හැකි වුවත් එය මා විසින් සඳහන් කරන ලද අනිත් කරුණු වලට වඩා පහතින් ගිණිය හැකි කරුණකි. යම් හෙයකින් මහජන සුභසිද්ධිය හෝ රටෙහි අස්ථිසිද්ධිය (මේ දෙකම එක් දෙයක් ලෙස ගැනේ) අපරාධකරුවාගේ මුලින් පැවති යහපත් චරිතය කලින් හැසිරීම සහ වයස යන කරුණුවලට වඩා ගරුක තත්ඛයක තිබෙන අවස්ථාවක ඇත්ත වශයෙන් ම මහජන සුභසිද්ධියට මුල් තැන ලැබිය යුතු ය. (මෙහි නොම්මර දමා ඇත්තේ මා විසිනි).

මේ කරුණු වලට පහත සඳහන් කරුණු ද ගෞරව පෙරටුව මට එකතු කළ හැක.

(5) : අපරාධයට ගොදුරු වූ තැනැත්තාට සිදු වූ පාඩුව.

(6) : සාහසිකයාට තම ක්‍රියාවෙන් ලැබිය හැකි ප්‍රතිලාභය.

(7) : සොර බඩුවක් කෙබඳු විධියකින් ප්‍රයෝජනයට ගත හැකි ද යන්න."

රජින එ. දෙන් ලීලරත්න 9

ඉඩම් අත්කර ගැනීමේ ආඥා පණත

ඉඩම් අත්කර ගැනීමේ ආඥා පණත—38, 40 සහ 42 (2) යන ඡේද—මෙම පණත යටතේ නිලධාරීන්ට පැවරෙන බලය—අනුගමනය කළ යුතු කායික පරිපාටිය—මෙම ඡේදයන් යටතේ රජයට භාරගත් ඉඩම් වල අයිතිකරුවන්ට, එසේ භාර ගැනීමට විරුද්ධ කරුණු පැමට බලයක් ඇත් ද.

තීන්දුව : ඉඩම් අත්කර ගැනීමේ ආඥා පණතේ 42 (2) ඡේදය යටතේ පිය්කල් නිලධාරිතැනට එසේ රජයට අයත් කර ගන්නා ඉඩම භාරදීමට යයි නියෝගයක් කරණ ලෙස ඉල්වා මහේස්ත්‍රාත්වරයාට කරණ ලද ඉල්ලීමක් අනිත් පාර්ශවය ඉදිරිපිට නොමැතිව ඇසිය හැකි ඉල්ලීමක් නිසා ඒ ඉල්ලීමට විරුද්ධව යම් කෙනෙකුට කරුණු දැක්වීමට ඉඩ දී නැත.

මහම්මදු ලෙබ්බේ එ. මාදන (ප්‍රාදේශිය ආදයම් නිලධාරිතුමා, යටිනුවර) 21

දණ්ඩ නීති සංග්‍රහය

දණ්ඩ නීති සංග්‍රහයේ 315 වන ඡේදය—පොරවකින් කැපීම—චෝදිතයා වරදකරු වීම—දඩුවමේ ප්‍රමාණවත්කම—අපරාධ නඩු විධාන සංග්‍රහයේ

335 වන ඡේදය—මේ ඡේදය යටතේ ඇපැලක් ඉදිරිපත් කිරීමට පෙර උසාවියෙන් අවසර ඉල්ලීම —මෙසේ අවසර දීමට හේතුයුක්ති මහේස්ත්‍රාත්-වරයා විසින් දිය යුතු ද?

තීන්දුව : (1) අපරාධ නඩු සංවිධාන සංග්‍රහයේ 335 වෙනි ඡේදයට අනුව ඉදිරිපත් කරන ලද ඇපැල් පෙත්සමකට අවසරදීම සුලු දෙයක් යයි සිතා ඊට ඉඩ දීම නුසුදුසුය. එසේ ඉඩ දීමට ඇති හේතු යුක්ති සඳහන් කළ යුතු ය.

(2) චිත්තිකරු පොරොවකින් ගැසූ පහර පැමිණිලිකරු වලක්වන්ට උත්සාහ නොකෙළේ නම්, මීට වඩා බරපතල තුවාල ඇතිවන්ට ඉඩ තිබූ නිසා මෙ බඳු දේ නො කරණ ලෙස දඩුවමක් පැවැරිය යුතුයි.

අලගන් එ. අප්පුහාමි 23

දණ්ඩ නීති සංග්‍රහය

''අපරාධ නඩු සංවිධාන සංග්‍රහය'' යට බලන්න.

රැජින එ. දෙන් ලීලාරත්න 9

පැමිණිල්ල සංශෝධනය

''බෞද්ධාගමික නීතිය'' යට බලන්න 5

ප්‍රාදේශීය බලමණ්ඩල (ස්ථාවර අතුරු ව්‍යවස්ථා) පනත

අතුරු ව්‍යවස්ථා ප්‍රාදේශීය බලමණ්ඩල (ස්ථාවර අතුරු ව්‍යවස්ථා) පනත, නො: 6/1952, (261 වෙනි පරිච්ඡේදය) යටතේ සම්පාදිත—එළවලු ආදිය ප්‍රසිද්ධ වෙළඳ ප්‍රදේශයතුළ හැර අන් තැනෙක විකිණීම තහනම් කරන අතුරු ව්‍යවස්ථාවක්—එය උල්ලංඝනය කළාය යන චෝදනාවක්—එම අතුරු ව්‍යවස්ථාව රක්වානේ නගර සභාව පිළිගැන්ම සහ එය 1960-11-11 දින ගැසට් පත්‍රයේ පලවීම—නමුත් වෙළඳ ප්‍රදේශ සීමාව කුමක් දැයි ප්‍රකාශයට පත් කළේ 1963-2-23 දින නිසා යට කී අතුරු ව්‍යවස්ථාව නීත්‍යානුකූල ද?—සුලු නගර සභා පනත (256 වෙනි පරිච්ඡේදය), 151 (3) සහ 156 (11) (ඒ) යන ඡේද.

රක්වාන නගරයේ ප්‍රසිද්ධ වෙළඳ පොලෙන් බාහිර තැනක එළවලු විකිණීමෙන් ඇපැල්කරු ප්‍රාදේශීය බලමණ්ඩල (ස්ථාවර අතුරු ව්‍යවස්ථා) පනත යටතේ සම්පාදිත 15 වෙනි කොටසේ සඳහන් 16 (1) දරණ අතුරු ව්‍යවස්ථා උල්ලංඝනය කරන ලදැයි දඩුවම් ලැබුවාය. එම අතුරු ව්‍යවස්ථාව රක්වාන සුලු නගර සභාව පිළිගෙන 1960-11-11 දින නිකුත් වූ නොමිමර 12226 දරණ ගැසට් පත්‍රයේ පලවීමෙන් එදින එය ක්‍රියාත්මක බවට පැමුණුනේ ය. නමුත් රක්වාන ප්‍රදේශයේ කඩ විදිය නොහොත් ප්‍රසිද්ධ වෙළඳ ප්‍රදේශ සීමාවකුමක් දැයි ප්‍රකාශ කර ඇත්තේ 1963-2-23 දින නිසා යට කී 16 (1) වෙනි අතුරු ව්‍යවස්ථාව නීත්‍යානුකූල නොවේ යයි ඇපැල්කරු වෙනුවෙන් කියා සිටියේ ය.

තීන්දුව : සුළු නගර සභා පනතේ 151 (3) වෙනි උපඡේදය අනුව ඉටුවිය යුතු කරුණක් වූ ප්‍රසිද්ධ වෙළඳ ප්‍රදේශය සීමා කිරීම මෙම අතුරු ව්‍යවස්ථාව ක්‍රියාත්මක වූ දින සම්පූර්ණ වී නො තිබුන හෙයින් එය නීත්‍යානුකූල නැත.

රොමියෙල් එ. ආදයම් සහ කම්හන්ත පාලක නිලධාරියා (රක්වානේ සුළු නගර සභාවේ) ... 1

බෞද්ධාගමික නීතිය

පැමිණිල්ල සංශෝධනයක්—පැමිණිලිකරු තමාගේ ගුරු හාමුදුරුවන් වූ සරණංකර සංඝරාජයන්ගේ අයිතිය පිට විහාරාධිපති ධුරය ඉල්ලීම—හරස් ප්‍රශ්න ඇසීමේදී පැමිණිලිකරු විසින් තමාගේ ගුරු හාමුදුරුවන්ට වඩා ජ්‍යෙෂ්ඨ සහෝදර නමක් සිටි බවත් ඒ නම විහාරාධිපති ධුරය දැරූ බවත් පිළිගැනීම—තව ද ඒ ජ්‍යෙෂ්ඨ සහෝදර නමට මෙධංකර සහ සරණංකර කියා ගෝල වූ දෙනමක්වීමත් මේ දෙනමට කුඩා සරණංකර සහ තමාත් ගෝලයන් බව ද කුඩා සරණංකර ජ්‍යෙෂ්ඨ ගෝලයා බව ද පිළිගැනීම—මෙධංකර හිමිගේ මරණින් පසු කුඩා සරණංකර විසින් මෙම නඩුවට භාජනවූ විහාරයේ අධිපතිකම පැමිණිලිකරුට අහැර වෙන විහාරයක අධිපතිවීම—තමාගේ ගුරු වූ සරණංකර හිමි තමාගේ අවසරය පිට විහාරය පාලනය කිරීම මෙසේ පිළිගත් කරුණු අනුව පැමිණිල්ල සංශෝධනය කිරීමට නැවත නඩු විභාග දිනයට ප්‍රථම ඉල්ලීම—චිත්තිය ඊට විරුද්ධවීම හා විනිශ්චයකාරතුමා ඊට ඉඩ නොදීම—එම තීන්දුවෙන් ඇපැල් ගැනීම.

කිරිවැවුල විහාරයේ විහාරාධිපතිත්වය තමාට හිමි බව කියන ප්‍රකාශයක් ලබාගැනීම සඳහා පැමිණිලිකරුවා චිත්තිකරුවන් හතර දෙනෙකුට

විරුඬව මෙම නඩුව පැවරුවේ එහි අන්තිමට අධිපති ධුරය දැරූ සරණංකර හිමි තමාගේ ගුරුවරයන් වහන්සේ බව කියමිනි.

චිත්තිකරුවන් උත්තර බඳන ලද්දේ විහාරයේ දායකයන් විසින් පත් කරණ ලදුව සුමන සාවීර පාදයන් වහන්සේ එහි විහාරාධිපති බවත් වෂී 1959 උන්වහන්සේගේ අභාවයෙන් පසු උන්වහන්සේ විසූ තනතුරට පත්වන්නා හැටියට තුන්වන චිත්තිකරු දායකයන් විසින් පත් කරණ ලද බවත් කියමිනි.

නඩුව ආරම්භයේදී සාක්ෂි දුන් පැමිණිලිකරු තමාගෙන් හරස් ප්‍රශ්න අසනු ලැබීමේදී පහත සඳහන් කරුණු පිළිගත්තේ ය :—

(ඒ) තමාගේ ගුරුවරයන්වහන්සේ වූ සරණංකර හිමියන්ට උන්වහන්සේට වඩා ජ්‍යෙෂ්ඨ මෙධංකර නමැති පැවිදි සහෝදර හිමිනමක් සිටි බව;

(බී) මෙධංකර හිමියන් විහාරාධිපති ලෙස කටයුතුවල නිරත වූ බව;

(සී) මෙධංකර හිමියන්ට සහ සරණංකර හිමියන්ට කුඩා සරණංකර නමින් ශිෂ්‍යයෙක් ද පැමිණිලිකාර හිමියන් ද යන ශිෂ්‍යයන් දෙනමක් සිටි බව; එක අවස්ථාවේදී උපසම්පදව ලැබුවද අනෙක් ශිෂ්‍ය නම කලින් පැවිදි වූ බව;

(ඩී) කුඩා සරණංකර හිමියන් තම ගුරුවරයන් වහන්සේ සතු වෙන පන්සලක විහාරාධිපති වූ බව සහ පැමිණිලිකරු කිරිවැවුල විහාරය සහ තවත් පන්සලක් පිළිබඳව අයිතිවාසිකම් තියන බව.

ඊළඟ නඩු දිනයට කලින් පැමිණිලිකාර හිමියන් වහන්සේ පහත සඳහන් කරුණු සැලකර සිටීමින් පැමිණිල්ල සංශෝධනය කිරීමට සැරසිනි :—

(ඒ) තමන්වහන්සේගේ ගුරුවරුන් දෙදෙනාගෙන් විහාරාධිපති වූයේ මෙධංකර හිමියන් ය;

(බී) කුඩා සරණංකර හිමි තමාට වඩා ජ්‍යෙෂ්ඨ වූ නමුත් උන්වහන්සේ පැමිණිලිකරුගේ වාසියට කිරිවැවුල විහාරය සහ තවත් විහාරයක් අතහැර දමා ගියේ ය;

(සී) උන්වහන්සේ විහාරාධිපති වශයෙන් මෙධංකර හිමියන් වෙනුවට පත් වූ නමුත් තමන්වහන්සේගේ ගුරුවර සරණංකර හිමියන් පැමිණිලිකාර තමන්වහන්සේගේ අවසරය පරිදි එම විහාර දෙක පරිපාලනය කළහ.

මෙසේ අදහස් කරණ ලද සංශෝධනයන්ට චිත්තිකරුවන් විසින් දක්වන ලද විරෝධය උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා පිළිගත්තේ ය. ඊට විරුඬව පැමිණිලිකරු ඇපැල් පෙත්සමක් ඉදිරිපත් කෙළේ ය.

තීන්දුව : පහත පෙනෙන කරුණු උඩ එම සංශෝධනයට ඉඩ දිය යුතුව තිබුනි :—

(ඒ) සරණංකර හිමියන් තත්ඛය අනුව විහාරාධිපතිව සිටියද (de facto) නීතිය අනුව (de jure) විහාරාධිපති මෙධංකර හිමියන් බව සැලකර සිටීමට සංශෝධනයෙන් පරිශ්‍රමයක් දරා තිබේ;

(බී) පැමිණිලිකරුට ජය ගත හැක්කේ උන්වහන්සේට කුඩා සරණංකර හිමි තමන්ගේ අයිතිවාසිකම් අත්හැරිය බව පෙන්වීමට හැකි වුවොත් පමණකි;

(සී) නඩු නිමිත්ත එකම වන අතර පාර්ශවකරුවන් ද ඒ අයම ය;

(ඩී) අදහස් කරන ලද සංශෝධනයෙන් කරුණු වල ඇති නියම තත්ඛය පිළිබඳව නීත්‍යානුකූල ලෙස තෝරා දීමට උත්සාහයක් දරා තිබේ.

බැරුම්මණ විපස්සි නායක ස්වාමීන් වහන්සේ එ. ඌරාපොල ජිනරතන ස්වාමීන් වහන්සේ සහ තවත් තිදෙනෙක් 5

මහේස්ත්‍රාත් උසාවිය

කල්දැමීම පිණිස අපරාධ නඩුවක දී කළ ඉල්ලීමක්—දිනයක් ලබා ගැනීම සඳහා පමණක් කථා කිරීමට තමා පත් කළේ යයි නිතිඥතැන කියා සිටීම—මහේස්ත්‍රාත්තුමා ඉල්ලීම ප්‍රතික්ෂේප කිරීම—අවශ්‍ය ලිපි ලේඛන සහ සාක්ෂි කරුවන් නොමැති නිසා යයි ඉල්ලීම යළිත් ඉදිරිපත් කිරීම—සාක්ෂිකරුවන්ගේ ලේඛනය ඉදිරිපත් කර නොතිබීම—සාක්ෂි ලේඛනය නොමැති නිසා ඉල්ලීම ප්‍රතික්ෂේප කිරීම—චිත්තිකරු නඩුවිභාගයට සූදානම් සිටීම—නඩුව කොටසක් අසා පැමිණිලි

පක්ෂයට ලේඛනයට ඇතුලත් කල සාක්ෂිකරුවන් කැඳවීමට පහසුවීම පිණිස ඉන්පසු කල් දැමීම—චිත්තිකරුට ඉන් හානියක් සිදු වූයේ ද?

දිනයක් ලබා ගැනීම සඳහා පමණක් තමා පත් කරණ ලදැයි යන හේතුව දක්වමින් අපරාධ නඩුවක නීතිඥයෙක් මහේස්ත්‍රාත් උසාවියෙන් දිනයක් අයැද සිටියේය. මේ ඉල්ලීම ප්‍රතික්ෂේපවූ පසු ඔහු නඩුවට අදළ ලිපි ලේඛන සහ චිත්තියේ සාක්ෂිකරුවන් නො මැති බව කියමින් තම ඉල්ලීම නැවත ඉදිරිපත් කෙළේ ය.

මෙම නඩුවෙහි සාක්ෂි ලේඛනයක් ඉදිරිපත් කොට නැතැයි දැනගත් මහේස්ත්‍රාත්තුමා එම ඉල්ලීම සැලකිය යුතු සාරයක් නොමැති බව කියමින් දිනයක් දීම ප්‍රතික්ෂේප කෙළේ ය. එහෙත් චිත්තිකරු තමා ම නඩුවිභාගයට සූදානමින් සිටි නිසා නඩුව විභාග වීගෙන යන අතර පැමිණිලි පක්ෂයේ සාක්ෂිකරුවන් තිදෙනෙකු සාක්ෂි දුන් පසු පැමිණිල්ලේ අමුනා තිබූ ලේඛනයේ ඇති සාක්ෂිකරුවකු කැඳවීම පිණිස නඩුව කල් දමා දිනයක් නියම කරන ලදී.

පසුව චිත්තිකරු වරදකරු කරණු ලැබුයෙන් ඔහු ඇපැල් පෙත්සමක් ඉදිරිපත් කෙළේ ය.

නීතුව : (1) මෙම නඩුවෙහි කරුණු අනුව සලකා බලන කල නඩුව කල් දැමීම සඳහා තමා වෙත ඉදිරිපත් කරණ ලද ඉල්ලීම මහේස්ත්‍රාත්වරයා විසින් ප්‍රතික්ෂේප කිරීම යුක්ති සහගත ය.

(2) මහේස්ත්‍රාත්වරයා විසින් නඩුවේ පැමිණිල්ල කොටසක් අසා ඉන්පසු වෙන දිනයකට කල් දැමීමෙන් චිත්තිකරුට කිසිම අවාසියක් සිදුවී නැත.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා:—"මහේස්ත්‍රාත් උසාවියෙන් දිනයක් ලබා ගැනීම සඳහා පමණක් නීතිඥයකු පත් කිරීම මේ උසාවියට තේරුම් ගත නො හැකි කරුණකි".

දෙන් පියදස එ. සෙනෙවිරත්න (හෝමාගම උපපොලිස් පරීක්ෂක) 19

මහෙස්ත්‍රාත් උසාවිය

එම උසාවිය විසින් දණ්ඩනීති සංග්‍රහයේ 367,394 වන ඡේද යටතේ වරදකරුවෙකු වූ චුදිතයෙකුට දිය යුතු දඩුවම.

රැජින එ. දෙන් ලීලරත්න 9

එම උසාවිය විසින් දණ්ඩ නීති සංග්‍රහයේ 315 වන ඡේදය යටතේ පොරවකින් කැපීමේ චෝදනාවකට වරදකරු වූ තැනැත්තෙකුට දිය යුතු දඩුවම.

අලගන් එ. අප්පුහාමි 23

විහාර දේවාල පනත

විහාර දේවාල පනත, 23 වෙනි ඡේදය—අපවත් වූ භික්ෂුවක් විසින් තමා නමින් මිලයට ගත් ඉඩමක්—ඒ භික්ෂුව අයිති විහාරයට එය අයිති විය යුතු යයි ඉල්ලා සිටීම—ඒ ඉල්ලීම සනාථ කිරීමට ඔප්පු කල යුතු කරුණු.

නීතුව : අපවත් වූ භික්ෂුවක් විසින් තමා නමින් මිලයට ගෙන තිබූ ඉඩමක් එම භික්ෂුවගේ ජීවිත කාලයේ දී අන්සතු නො කරන හෙයින් එය උන්වහන්සේ අයිති විහාරයට අයිති යයි කියා ඉල්ලීම සනාථ කිරීම හැකි වන්නේ හුදෙක් උන්වහන්සේගේ පුද්ගලික ප්‍රයෝජනයට මිල දී ගත් බව ඔප්පු කිරීමෙන් ය.

හන්වැල්ලේ පියරතන ථෙර එ. කණුමලේ ජිනානන්ද ථෙර සහ තවත් අයෙක් 17

විහාර දේවාල පනත

"ඛෙඟඛාගමික නීතිය" යට බලන්න. ... 5

සිවිල් නඩු විධාන සංග්‍රහය

සිවිල් නඩු විධාන සංග්‍රහයේ 18 වන ඡේදය—යම් පක්ෂයක් චිත්තියට එකතු කිරීම—පක්ෂයක් චිත්තියට එකතු කිරීමේ හේතු උසාවිය මගින් විස්තර කළ යුතු ය යන අවශ්‍යතාවය.

නීතුව : යම් විනිශ්චයකාරයකු විසින් යම් පක්ෂයක් චිත්තියට එකතු කිරීමේ නියෝගයක් කරනු ලැබූ විට සිවිල් නඩු විධාන සංග්‍රහයේ 18 (2) වන ඡේදයේ සඳහන් අන්දමට එ වැනි නියෝගයක් කිරීමට හේතු වූ සාධක සහ කරුණු විස්තර කළ යුතු බව.

ආසියා උම්මා සහ තවත් අය එ. මොහම්මදු සයින් 18

සුළු නගර සභා පනත

"ප්‍රාදේශීය බල මණ්ඩල (ස්ථාවර අතුරු ව්‍යවස්ථා) පනත" යට බලන්න. 1

ගරු අබේසුන්දර විනිශ්චයකාරතුමා ඉදිරිපිට

රොමියෙල් එ. ආදුසම් සහ කම්මාන්ත පාලක නිලධාරියා (රක්වානේ සුළු නගර සභාවේ*)

ශ්‍රේෂ්ඨාධිකරණයේ අංකය: 781—රක්වානේ මහේස්ත්‍රාත් උසාවියේ අංකය: 87323.

විවාද කොට තීන්දු කළ දිනය: 27 අප්‍රෙල් 1964.

අතුරු ව්‍යවස්ථා ප්‍රාදේශීය බලමණ්ඩල (ස්ථාවර අතුරු ව්‍යවස්ථා) පණත, නෝ: 6/1952, (261 වෙනි පරිච්ඡේදය) යටතේ සම්පාදිත—එළවලු ආදිය ප්‍රසිඩ වෙළඳ ප්‍රදේශය තුළ හැර අන් තැනෙක විකිණීම තහනම් කරන අතුරු ව්‍යවස්ථාවක්—එය උල්ලංඝනය කළාය යන චෝදනාවක්—එම අතුරු ව්‍යවස්ථාව රක්වානේ නගර සභාව පිළිගැන්ම සහ එය 1960–11–11 දින ගැසට් පත්‍රයේ පලවීම—නමුත් වෙළඳ ප්‍රදේශ සීමාව කුමක් දැයි ප්‍රකාශයට පත් කළේ 1963–2–23 දින යට කී අතුරු ව්‍යවස්ථාව නීත්‍යානුකූල ද?—සුලු නගර සභා පණත (256 වෙනි පරිච්ඡේදය), 151 (3) සහ 156 (11) (ඒ) යන ඡේද.

රක්වාන නගරයේ ප්‍රසිඩ වෙළඳ පොලෙන් බාහිර තැනක එළවලු විකිණීමෙන් ඇපැල්කරු ප්‍රාදේශීය බල-මණ්ඩල (ස්ථාවර අතුරු ව්‍යවස්ථා) පණත යටතේ සම්පාදිත 15 වෙනි කොටසේ සඳහන් 16 (1) දරණ අතුරු ව්‍යවස්ථා උල්ලංඝනය කරන ලදැයි දඩුවම් ලැබුවාය. එම අතුරු ව්‍යවස්ථාව රක්වාන සුලු නගර සභාව පිළිගෙන 1960–11–11 දින නිකුත් වූ නොම්මර 12226 දරණ ගැසට් පත්‍රයේ පලවීමෙන් එදින එය ක්‍රියාත්මක බවට පැමුණුනේ ය. නමුත් රක්වාන ප්‍රදේශයේ කඩවීදිය නොහොත් ප්‍රසිඩ වෙළඳ ප්‍රදේශ සීමාව කුමක්දැයි ප්‍රකාශ කර ඇත්තේ 1963–2–23 දින නිසා යට කී 16 (1) වෙනි අතුරු ව්‍යවස්ථාව නීත්‍යානුකූල නොවේ යයි ඇපැල්කරු වෙනුවෙන් කියා සිටියේ ය.

තීන්දුව:— සුළු නගර සභා පණතේ 151 (3) වෙනි උපඡේදය අනුව ඉටුවිය යුතු කරුණක් වූ ප්‍රසිඩ වෙළඳ ප්‍රදේශය සීමා කිරීම මෙම අතුරු ව්‍යවස්ථාව ක්‍රියාත්මක වූ දින සම්පූර්ණ වී නොතිබුන හෙයින් එය නීත්‍යානුකූල නැත.

නීතිඥවරු:— රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා, ඇල්. සී. සෙනෙවිරත්න මහතා සමග, චෝදිත-ඇපැල්කරු වෙනුවෙන්.

ආචාර්‍ය කොල්වින් ආර්. ද සිල්වා මහතා, යූ. බී. වීරසේකර මහතා සමග පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්.

ගරු අබේසුන්දර විනිශ්චයකාරතුමා:

රක්වාන නගරයේ කඩවීදියේ ප්‍රසිඩ වෙළඳ පොලෙන් බාහිර තැනක එළවළු විකිණීමෙන් ඇපැල්කරු ප්‍රාදේශීය බල මණ්ඩල (ස්ථාවර අතුරු ව්‍යවස්ථා) පණතේ 15 වෙනි කොටසේ සඳහන් 16 (1) දරණ ඡේදය යටතේ සම්පාදිත අතුරු ව්‍යවස්ථාව උල්ලංඝනය කරන ලදැයි ඔහුට විරුඬව නඩු පවරා තිබුණි. මෙම අතුරු ව්‍යවස්ථාව රක්වාන සුළු නගර සභාව විසින් වෂී 1960 නොවැම්බර මස 11 වෙනි දින නිකුත් වූ නොම්මර 12226 දරණ ගැසට් පත්‍රයෙන් පිළිගන්නා ලද්දකි.

ඇපැල්කරු වෙනුවෙන් පෙනී සිටි රාජනීතිඥ එච් ඩබ්ලිව්. ජයවර්ධන මහතා නීතිය පිළිබඳ කරුණක් මතුකරමින් එකී අතුරු ව්‍යවස්ථාව නීති විරෝධ යැයි සැලකර සිටියේ ය. ඔහු සුළු නගර සභා ආඥා පණතේ 151 (3) ඡේදය ගැන සඳහන් කළේය. එහි කඩවීදියේ ප්‍රසිඩ වෙළඳ පොලේ මහජන අවශ්‍යතාවයන් සපුරාලීමේ පහසුකම් ඇතැයි සුළු නගර සභාව තෘප්තියට පත්වූ විටක එම ප්‍රසිඩ වෙළඳ පොලේ හැර කඩවීදියේ අන් තැනක මස් මාංශ, කුකුළු වර්ගයේ සතුන් හෝ පළතුරු හෝ එළවළු විකිණීම තහනම් කෙරෙන අතුරු ව්‍යවස්ථාවක් පැනවිය හැකි බව සඳහන් වී තිබේ. මෙම

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංගයේ 66 වෙනි කා., 12 වෙනි පිට බලනු.

ඡේදයෙහි පැනවී ඇති මෙම නඩුවට අදාළ නොවන කොටස් මා විසින් මෙහිදී අත හැර තිබේ.

ප්‍රාදේශීය මණ්ඩල (ස්ථාවර අතුරු ව්‍යවස්ථා) පණතේ 3 (1) දරණ ඡේදය අනුව යම්කිසි ප්‍රාදේශීය මණ්ඩලයක් විසින් පිළිගනු ලැබූ අතුරු ව්‍යවස්ථා එම ප්‍රාදේශීය මණ්ඩලයට අයත් පරිපාලන සීමාව තුල බල පවත්වන්නේ ඒ අතුරු ව්‍යවස්ථා පිළිගනු ලැබූ යෝජනාව ආණ්ඩුවේ ගැසට් පත්‍රයක පලවූ දින සිට හෝ එම යෝජනාවෙහිම සඳහන් කර ඇති යම්කිසි ඊට පසුව එළඹෙන දිනයක් ඇත්නම් එ දින සිට ය. රක්වාන සුළු නගර සභාව මෙම අතුරු ව්‍යවස්ථා පිළිගත් යෝජනාවෙහි එය ක්‍රියාත්මක වන දිනයක් සඳහන් වී නොමැත. එබැවින් නගර සභාව විසින් පිළිගත් එම අතුරු ව්‍යවස්ථා බලපවත්වන්නේ එම යෝජනාව ගැසට් පත්‍රයෙහි පළකර වන ලද දිනය වන 1960 නොවැම්බර මස 11 වෙනි දින සිට ය. ඇපැල්කරු විසින් උල්ලංඝනය කරන ලදැයි කියන තහනම ඇතුලත් අංක 16 දරණ යටොක්ත අතුරු ව්‍යවස්ථාව පිළිගෙන ක්‍රියාත්මක වී තිබෙන්නේ රක්වාන නගරයෙහි කඩවීදියට අයත් ප්‍රදේශයක් සීමා සහිත නියම කිරීමට කලිනි. එම ප්‍රදේශයෙහි කඩවීදිය නොහොත් වෙළඳ ප්‍රදේශය ප්‍රකාශයට පත්කර ඇත්තේ වෂී 1963 පෙබරවාරි 23 වෙනි දිනය. සුළු නගර සභා ආඥා පණතේ ප්‍රසිඩ වෙළඳ පොලවල් පිළිබඳව අතුරු ව්‍යවස්ථා සැදීමට බලය දෙන 156 (11) (ඒ) ඡේදයෙන් පැනවෙන්නේ ප්‍රසිඩ වෙළඳ පොලක් ප්‍රකාශයට පත්කිරීම හා එම සීමාව තුල බඩු විකිණීම තහනම් කිරීම කළ යුත්තේ සුළු නගර සභා ආඥා පණතේ 151 වන ඡේදයට අනුකූලව යනුයි. අවසානයෙහි සඳහන් වූ මෙම ඡේදයෙන් කියැවෙන්නේ එවකට කඩවීදියක් (වෙළඳ ප්‍රදේශයක්) තිබිය යුතු බව සහ එම ප්‍රසිඩ වෙළඳ පොලේ මහජන අවශ්‍යතාවයන් සපුරාලීමට සුදුසු පහසුකම් සැපයී ඇතැයි සුළු නගර සභාව තෘප්තියට පත්වූ පසු පමණක් මෙ වැනි අතුරු ව්‍යවස්ථාවක් පැනවිය හැකි බවකි. එසේ ඇති කලක ප්‍රසිඩ වෙළඳ පොලෙහි හැර වෙන යම්කිසි තැනක මස්මාංශ, කුකුළු වර්ගයේ සතුන්, පළතුරු හා එළවළු වර්ග කඩවීදියේ වෙළඳ ප්‍රදේශයෙහි විකිණීම තහනම් කෙරෙන හෝ කඩවීදියේ ප්‍රසිඩ වෙළඳ පොලේ සහ අවසර ලත් අනෙක් ප්‍රදේශයන්හි හැර අන් තැනෙක වෙළඳාම තහනම් කෙරෙන අතුරු ව්‍යවස්ථාවක් පැනවිය හැක.

අංක 16 දරණ මෙම අතුරු ව්‍යවස්ථාව ක්‍රියාත්මක කරන ලද අවස්ථාවෙහි රක්වානේ සුළු නගර සභාවට එය පැනවිය හැකි කරුණු නොපැවතිණ. එම නිසා නීතිය අනුව සලකන විට එවකට එම අතුරු ව්‍යවස්ථාව පැනවීමට සුළු නගර සභාවට බලයක් නොතිබිණි. මේ නියායෙන් මම අංක 16 දරණ අතුරු ව්‍යවස්ථාව නීත්‍යානුකූල නොවේ යයි නිගමනය කරමි.

එබැවින් තමා වරදකරු කිරීමට විරුඩව හා තමා පිට පවරන ලද දඩුවමට විරුඩව ඇපැල්කරු විසින් ඉදිරිපත් කරන ලද ඇපැලට ඉඩදිය යුතු ය. මම එම වරදට පත් කිරීම සහ පවරන ලද දඩුවම ඉවත් කොට චෝදිත අය නිදහස් කර හරිමි.

ඇපැලට ඉඩ දෙන ලදී.

ගරු අබේසුන්දර විනිශ්චයකාරතුමා ඉදිරිපිට

වඩිවේළු එ. කණගරත්නම්*

සු: උ: නොම්මරය: 351/1963—ම: උ: නුවරඑළිය, නොම්මර 24715.

වාද කළේ සහ තීන්දු කළේ: 1963 සැප්තැම්බර් 5 වනද.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 66 වෙනි කා., 16 වෙනි පිට බලනු.

අපරාධ නඩුවිධාන සංග්‍රහයේ 148 (1) (බී), 148 (1) (බී) සහ 151 (2) වන ඡේද—සිතාසියක් හෝ වරෙන්තුවක් නැතිව චිත්තිකරු උසාවිය ඉදිරියට පැමිණවීම—151 (2) වන ඡේදයේ නියම වූ ලෙස වහාම පරීක්ෂණයක් පැවැත්වීමට මහේස්ත්‍රාත්වරයා විසින් අතපසු කිරීම.

තීන්දුව:— කැඳවීම් නියෝගයක් නොමැතිව චිත්තිකරුවෙකු උසාවිය ඉදිරියට පමුණුවනු ලැබූ කල්හි එසේ කළ පොලිස් නිලධාරියාව එම දිනයේම දිවුරුම් පිට පරීක්ෂා කිරීමට මහේස්ත්‍රාත්වරයා විසින් අතපසු කර තිබීම අපරාධ නඩු විධාන සංග්‍රහයේ 151 (2) වන ඡේදයේ නියමය අනුව පරීක්ෂණයක් පැවැත්වීමට අතපසු කළ ලෙස සැලකිය යුතු නිසා ඉන් පසුව ගත් සෑම පියවරක්ම අවලංගු විය යුතු ය.

නීතිඥවරු:— ටී. ඩබ්ලිව්. රාජරත්නම්, චිත්තිකාර-ඇපැල්කරු වෙනුවෙන්.

ඇන්. බී. ඩී. එස්. විජේසේකර, රජයේ අධිනීතිඥ ඇටෝර්නි-ජෙනරාල්තුමා වෙනුවෙන්.

ගරු අබේසුන්දර විනිශ්චයකාරතුමා:

1962 දෙසැම්බර් 9 වනද සොරකම් කිරීමේ චෝදනාවක් උඩ කැඳවීමේ නියෝගයක් නැතිව මේ නඩුවේ ඇපැල්කරු නුවරඑළියේ මහේස්ත්‍රාත්වරයා ඉදිරියට පමුණුවනු ලැබිය. රාගල පොලිසියේ පොලිස් භට පල්ලේවෙල විසින් ඔහු ගෙන එනු ලැබිය. කරන ලදුයි කියන වරදට සම්බන්ධ කරුණු ගැන මහේස්ත්‍රාත්වරයා විසින් වහාම දිවුරුම් පිට පොලිස් භටයා පරීක්ෂා කර නැත. ඔහු ඇපැල්කරුට ඇප දී ඇත. අපරාධ නඩු විධාන සංග්‍රහයේ 148 (1) (බී) වන ඡේදය යටතේ රාත්‍රී කාලයේ ගෙවල් බිඳීම සහ සොරකම් කිරීම ගැන රාගල පොලිසිය බාර නිලධාරියා විසින් 1963 ජනවාරි 17 වනද ඇපැල්කරුට විරුඬව නුවර එළියේ මහේස්ත්‍රාත් උසාවියේ නඩු පැවරුවේ ය. ඉන් පසුව සාක්ෂිකරුවන් දෙදෙනෙකු ප්‍රශ්න කර ඇපැල්කරුට විරුඬව චෝදනා සකස් කරන ලදී.

ඇපැල්කරුට විරුඬව පළමුවෙන්ම නීතිමාගීයෙන් කටයුතු කරන ලද්දේ අපරාධ නඩු විධාන සංග්‍රහයේ 148 (1) (ඩී) වන ඡේදය යටතේ වරදක් කිරීමේ චෝදනාවක් උඩ කැඳවීමේ නියෝගයක් නැතිව අත්අඩංගුවට ගත් චිත්තිකරු 1962 දෙසැම්බර් 9 වනද නුවරඑළියේ මහේස්ත්‍රාත් උසාවියට පමුණුවනු ලැබූ විටය. ඒ අවස්ථාවේදී පොලිස් භට පල්ලේවෙල දිවුරුම් පිට පරීක්ෂණයකට භාජන නො කිරීම අපරාධ නඩු විධාන සංග්‍රහයේ 151 (2) වන ඡේදයේ නියම අන්දමට පරීක්ෂණයක් පැවැත්වීමට අතපසු කළ ලෙස සැලකිය යුතු ය.

එම නිසා මම ඇපැල්කරු වරදකරු කිරීමේ නියෝගය ද ඔහුට නියම කර ඇති දඩුවම ද ඉවත් කර ඔහුගේ නඩුව වෙනත් මහේත්‍රාත්වරයෙකු ඉදිරියේ විභාග කළ යුතු යයි නියම කරමි.

නැවත විභාගයට
ආපසු යවන ලදී.

ගරු ඇල්. බී. ද සිල්වා විනිශ්චයකාරතුමා ඉදිරිපිට

ඩේවිඩ් නොහොත් ලොකුමහත්මයා එ. මාරවිල, පොලිස් ඉන්ස්පෙක්ටර්*

සු. උ. නො: 677-678/63—ම. උ. නඩු නො: ඩී 4490.

විවාදය හා තීන්දුව : 1963 නොවැම්බර් මස 29 වන දින.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 66 වෙනි කා., 15 වෙනි පිට බලනු.

අපරාධ නඩු විධාන සංග්‍රහයේ 304, 325 (1) (බී), 338 (1) වැනි ඡේද—කොන්දේසි සහිත නිදහස් කිරීම—යහපත් කල්ක්‍රියාවෙන් සිටීමට චිත්තිකරුගේ ඇප බැඳීම.

තීන්දුව:— යම්කිසි චිත්තිකරුවෙකු අපරාධ නඩු විධාන සංග්‍රහයේ 325 (1) (බී) වැනි ඡේදය යටතේ යහපත් කල්ක්‍රියාවෙන් පැවතිය යුතු යයි ද, අණ කළ විටක වරදකරුවකු ලෙස තීන්දු කරනු ලැබීමටත් දඬුවම් පැමිණවීමටත් පෙනී සිටිය යුතු යයි ද නියෝග කළ කල්හි එම නියෝගය මහේස්ත්‍රාත් උසාවියේ "නඩු තීන්දුවක්" හෝ "අවසාන නියෝගයක්" නො වන්නේ ය. මේ අනුව එවැනි නියෝගයකට විරුද්ධව ඇපැල් ගැනීමට අයිතිවාසිකමක් ද නොමැත.

අනුගමනය කළ නඩු:— කසිම් එ. අබ්දුල් රසාක්, 38 න.නි.වා. 428; VIII ස.ල.නී. 75.
ප්‍රනාඳු එ. සෙනෙවිරත්න, 48 න.නි.වා. 431.

නීතිඥවරු:— ඇන්. ඇම්. ඇස්. ජයවික්‍රම මහතා, චිත්තිකාර-ඇපැල්කරු වෙනුවෙන්.
රජයේ අධිනීතිඥ ඩී. ඇස්. විජේසිංහ මහතා, නීතිපති වෙනුවෙන්.

ගරු ඇල්. බී. ද සිල්වා විනිශ්චයකාරතුමා:

දෙවන සහ තුන් වන චිත්තිකරුවන් අපරාධ නඩු විධාන සංග්‍රහයේ 325 (1) (බී) ඡේදය යටතේ යහපත් කල්ක්‍රියාවෙන් සිටීමටත් අණ කළ විටක වරදකරුවෙකු ලෙස තීන්දු කරනු ලැබීමටත් දඬුවම් පැමිණවීමටත් පෙනී සිටිය යුතු යයි කළ නියෝගයට විරුද්ධව මෙම ඇපැල ඉදිරිපත් කර තිබේ.

මෙවැනි නියෝගයන් ගැන ඇපැල් කළ අවස්ථාවන්හිදී එකටෙක පරස්පර විරෝධී තීරණයන් දී ඇති බවට මගේ අවධානය යොමු කොට තිබේ. අපරාධ නඩු විධාන සංග්‍රහයේ 338 (1) වැනි ඡේදය යටතේ මහේස්ත්‍රාත් උසාවියේ විනිශ්චයකට හෝ අවසාන නියෝගයකට විරුද්ධව ඇපැල් ගැනීමට චිත්තිකරුට අයිතියක් තිබේ. අවසාන නියෝගයක් යනු කුමක් දැයි බාලසිංහම්ගේ වාතාවල වාර්තා කරන ලද නඩුවක දී ඇති අර්ථය අනුව නිසැකයෙන් ම එම විධාන සංග්‍රහයේ 325 (1) (බී) වැනි ඡේදය යටතේ කරන ලද නියෝගයක් අවසාන නියෝගයක් නොවන්නේ ය.

මෙම නියෝගයෙන් නඩු විභාගය අවසන් නොවේ. තමන් කැමති නම් කොන්දේසි සහිත බැඳුමකට යටත් නොවීමට චිත්තිකරුවන්ට ප්‍රසාදය තිබිණ. එවැනි තත්ත්වයක් ඇති වූවා නම් නීතිය අනුව දඬුවමක් දීම මහේස්ත්‍රාත්වරයා අතින් සිදු වන්නේ ය. බැඳීමකට යටත් වූ පසුව ද එම කාලසීමාව තුලදී චිත්තිකරුවන් අතින් කොන්දේසි කැඩීමක් සිදුවුවහොත් ඔවුනට විරුද්ධව නිසි පියවර ගැනීමට මහේස්ත්‍රාත්වරයාට ඉඩ තිබේ. එම අවස්ථාවේදී චිත්තිකරුවන් වරදකරුවන් කොට ඔවුන් කළ වරදට දඬුවම් දෙනු ලැබේ. අනෙක් ප්‍රශ්නය නම් මෙය මහේස්ත්‍රාත් උසාවියේ විනිශ්චයක් ලෙස සැලකිය හැකි ද යන්න ය. විනිශ්චයක් යනු කුමක් දැයි අපරාධ නඩු විධාන සංග්‍රහයේ විග්‍රහ කොට නොමැත. එහෙත් 304 වැනි ඡේදය යටතේ දෙන ලද විනිශ්චයක් පිළිබඳව 25 වන පරිච්ඡේදයේ මෙසේ පනවා ඇත: "මෙම පණත යටතේ කරන ලද හැම විනිශ්චයක්ම එක්රැස්වූ උසාවිය ඉදිරියේදී ප්‍රසිද්ධියේ ප්‍රකාශ කළ යුතුය. එය කළ යුත්තේ තීරණය සටහන් කළ විගසම ය. නැත හොත් නඩු කී අයට හෝ ඒ ඒ පක්ෂවලට හෝ ඔවුන් වෙනුවෙන් පෙනී සිටි අයට එම ප්‍රකාශය කරන බව දන්වා එසේ කළ යුතු ය." මහේස්ත්‍රාත් උසාවියක් පිළිබඳව කිව හැක්කේ 190 වැනි ඡේදය යටතේ තීරණයක් දිය හැකි බව ය. එ නම් මහේස්ත්‍රාත්වරයා විසින් චිත්තිකරු නිවැරදි කරු යයි විනිශ්චය කළ විට, එ වෙලෙහි ම චිත්තිකරු නිදෙස් යයි තීරණයක් සටහන් කළ යුතුය. වරදකරු යයි තීරණය කළ විට එ වෙලෙහිම වරදකරු යයි තීරණයක් සටහන් කොට නීතිය අනුව දඬුවම් පැනවිය යුතුය.

325 (1) (බී) ඡේදය යටතේ මහේස්ත්‍රාත්වරයා චිත්තිකරු වරදකරු යයි තීරණයක් සටහන් නොකරයි. වරදකරු බවට පත්කිරීමට පෙර මෙම විධිවිධාන යටතේ නිදහස් කිරීමේ නියෝගයක් මහේස්ත්‍රාත්වරයා කරයි.

මෙම නඩුවේදී 338 (1) වැනි ඡේදයේ අර්ථය අනුව ඇපැල් කළ හැකි විනිශ්චයක් නොමැති බව මගේ තීරණය යි. 38 න.නි.වා. 428; 48 න.නි.වා. 431, තීරණයන් අනුගමනය කරමින් ඇපැල් වලට විරෝධතාවය පිළිගනිමි.

එමනිසා ඇපැල් ඉල්ලීම් ප්‍රතික්ෂේප කරමි.

ඇපැල් ප්‍රතික්ෂේප කරන ලදී.

ගරු සන්සෝනි විනිශ්චයකාරතුමා සහ එච්. ඇන්. ජී. ප්‍රනාන්දු විනිශ්චයකාරතුමා ඉදිරිපිට

බැරුම්මණ විපස්සි නායක සවාමීන් වහන්සේ එ. ඤාරාපොල ජිනරතන සවාමීන් වහන්සේ සහ තවත් තිදෙනෙක්*

පිළිවෙලින් යන අංකය: 61/63.

ශ්‍රේෂ්ඨාධිකරණයේ අංකය: 160/61 (අතුරු)—මහනුවර දිස්ත්‍රික් උසාවිය, අංක: 6112/ඇල්.

විවාද කළ දිනය: නොවැම්බර් 1, 1963.
නීතු කළ දිනය: නොවැම්බර් 11, 1963.

පැමිණිල්ල සංශොධනයක්—පැමිණිලිකරු තමාගේ ගුරු හාමුදුරුවන් වූ සරණංකර ස්ථවිරයන්ගේ අයිතිය පිට විහාරාධිපති ධුරය ඉල්ලීම—හරස් ප්‍රශ්න ඇසීමේදී පැමිණිලිකරු විසින් තමාගේ ගුරු හාමුදුරුවන්ට වඩා ජ්‍යෙෂ්ඨ සහෝදර නමක් සිටි බවත් ඒ නම විහාරාධිපති ධුරය දැරූ බවත් පිලිගැනීම—තව ද ඒ ජ්‍යෙෂ්ඨ සහෝදර නමට මෙධංකර සහ සරණංකර කියා ගෝල වූ දෙනමක්වීමත් මේ දෙනමට කුඩා සරණංකර සහ තමාත් ගෝලයන් බවද කුඩා සරණංකර ජ්‍යෙෂ්ඨ ගෝලයා බව ද පිළිගැනීම—මෙධංකර හිමි ගේ මරණින් පසු කුඩා සරණංකර විසින් මෙම නඩුවට භාජනවූ විහාරයේ අධිපතිකම පැමිණිලිකරුට අතහැර වෙන විහාරයක අධිපතිවීම—තමාගේ ගුරු වූ සරණංකර හිමි තමාගේ අවසරය පිට විහාරය පාලනය කිරීම මෙසේ පිළිගත් කරුණු අනුව පැමිණිල්ල සංශෝධනය කිරීමට නැවත නඩු විභාග දිනයට ප්‍රථම ඉල්ලීම—විත්තිය ඊට විරුඩවීම හා විනිශ්චයකාරතුමා ඊට ඉඩ නොදීම—එම තීන්දුවෙන් ඇපැල් ගැනීම.

කිරිවැවුල විහාරයේ විහාරාධිපතිත්ඩය තමාට හිමි බව කියන ප්‍රකාශයක් ලබාගැනීම සඳහා පැමිණිලිකරුවා විත්තිකරුවන් හතර දෙනෙකුට විරුඩව මෙම නඩුව පැවරුවේ එහි අන්තිමට අධිපති ධුරය දැරූ සරණංකර හිමි තමාගේ ගුරුවරයන් වහන්සේ බව කියමිනි.

විත්තිකරුවන් උත්තර බඳන ලද්දේ විහාරයේ දායකයන් විසින් පත් කරණ ලදුව සුමන ස්ථවිරපාදයන් වහන්සේ එහි විහාරාධිපති බවත් වෂ 1959 උන්වහන්සේගේ අභාවයෙන් පසු උන්වහන්සේ විසූ තනතුරට පත්වන්නා හැටියට තුන්වන විත්තිකරු දායකයන් විසින් පත් කරණ ලද බවත් කියමිනි.

නඩුව ආරම්භයේදී සාක්ෂි දුන් පැමිණිලිකරු තමාගෙන් හරස් ප්‍රශ්න අසනු ලැබීමේදී පහත සඳහන් කරුණු පිළිගත්තේ ය:—

(ඒ) තමාගේ ගුරුවරයන්වහන්සේ වූ සරණංකර හිමියන්ට උන්වහන්සේට වඩා ජ්‍යෙෂ්ඨ මෙධංකර නමැති පැවිදි සහෝදර හිමිනමක් සිටි බව;

(බී) මෙධංකර හිමියන් විහාරාධිපති ලෙස කටයුතුවල නිරත වූ බව;

(සී) මෙධංකර හිමියන්ට සහ සරණංකර හිමියන්ට කුඩා සරණංකර නමින් ශිෂ්‍යයෙක් ද පැමිණිලිකාර හිමියන් ද යන ශිෂ්‍යයන් දෙනමක් සිටි බව; එක අවස්ථාවේදී උපසම්පදාව ලැබුවද අනෙක් ශිෂ්‍ය නම කලින් පැවිදි වූ බව.

(ඩී) කුඩා සරණංකර හිමියන් තම ගුරුවරයන් වහන්සේ සතු වෙන පන්සලක විහාරාධිපති වූ බව සහ පැමිණිලිකරු කිරිවැවුල විහාරය සහ තවත් පන්සලක් පිළිබඳව අයිතිවාසිකම් තියන බව.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 66 වෙනි කා., 43 වෙනි පිට බලනු.

ඊළඟ නඩු දිනයට කලින් පැමිණිලිකාර හිමියන් වහන්සේ පහත සඳහන් කරුණු සැලකර සිටිමින් පැමිණිල්ල සංශෝධනය කිරීමට සැරසිනි :—

(ඒ) තමන්වහන්සේගේ ගුරුවරුන් දෙදෙනාගෙන් විහාරාධිපති වූයේ මෙධංකර හිමියන් ය ;

(බී) කුඩා සරණංකර හිමි තමාට වඩා ජ්‍යෙෂ්ඨ වූ නමුත් උන්වහන්සේ පැමිණිලිකරුගේ වාසියට කිරිවැවුල විහාරය සහ තවත් විහාරයක් අතහැර දමා ගියේය ;

(සී) උන්වහන්සේ විහාරාධිපති වශයෙන් මෙධංකර හිමියන් වෙනුවට පත් වූ නමුත් තමන්වහන්සේගේ ගුරුවර සරණංකර හිමියන් පැමිණිලිකාර තමන්වහන්සේගේ අවසරය පරිදි එම විහාර දෙක පරිපාලනය කළහ.

මෙසේ අදහස් කරණ ලද සංශෝධනයන්ට විත්තිකරුවන් විසින් දක්වන ලද විරෝධය උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා පිළිගත්තේ ය. ඊට විරුද්ධව පැමිණිලිකරු ඇපැල් පෙත්සමක් ඉදිරිපත් කෙළේය.

නීන්දුව:— පහත පෙනෙන කරුණු උඩ එම සංශෝධනයට ඉඩ දිය යුතුව තිබුනි:—

(ඒ) සරණංකර හිමියන් තත්ඛය අනුව **(de facto)** විහාරාධිපතිව සිටියද නීතිය අනුව **(de jure)** විහාරාධිපති මෙධංකර හිමියන් බව සැලකර සිටීමට සංශෝධනයෙන් පරිශ්‍රමයක් දරා තිබේ ;

(බී) පැමිණිලිකරුට ජය ගත හැක්කේ උන්වහන්සේට කුඩා සරණංකර හිමි තමන්ගේ අයිතිවාසිකම් අත්හැරිය බව පෙන්වීමට හැකිවුවොත් පමණකි ;

(සී) නඩු නිමිත්ත එකම වන අතර පාර්ශවකරුවන් ද ඒ අයම් ය ;

(ඩී) අදහස් කරණ ලද සංශෝධනයෙන් කරුණුවල ඇති නියම තත්ඛය පිළිබඳව නීත්‍යානුකූල ලෙස තෝරා දීමට උත්සාහයක් දරා තිබේ.

නීතිඥවරු:— රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා, ඇස්. ඇස්. බස්නායක මහතා සමග පැමිණිලිකාර ඇපැල්කරු වෙනුවෙන්.

වර්තන් ජොන්ක්ලස් මහතා, විත්තිකාර-වගඋත්තරකරුවන් වෙනුවෙන්.

ගරු සන්සෝනි විනිශ්චයකාරතුමා :

මෙය තමාගේ පැමිණිල්ල සංශෝධනය කිරීමට පැමිණිලිකරු විසින් කරන ලද ඉල්ලීමකට අවකාශ දීම ප්‍රතික්ෂෙප කරමින් දෙන ලද නියෝගයකට විරුද්ධව ඉදිරිපත් කරන ලද ඇපැල් පෙත්සමකි.

පැමිණිලිකරු කිරිවැවුල විහාරයේ වැඩ විසීමට සහ එම විහාරය භුක්ති විඳීමට ද පරිපාලනය කිරීමට ද එයට අයත් විහාර දේවාල ගම් පාලනය කිරීමට ද තමාට හිමිකම ඇති බව ප්‍රකාශ කර ගැනීමේ අදහසින් සහ එම පැමිණිල්ලේ උපලේඛනයෙහි සඳහන්ව ඇති යම් යම් ඉඩම් වලින් විත්තිකරුවන් බැහැර කිරීමේ අදහසින් ද මෙම නඩුව පවරා තිබේ. එහි කලින් සිටි විහාරාධිපතීන් වහන්සේ සරණංකර මහාසංඝරාජ සඞ්ඝාමිපාදයන් වහන්සේ බවත් වෂ 1956 දී උන්වහන්සේගේ ඇවැමෙන් තමා උන්වහන්සේගේ ජ්‍යෙෂ්ඨ ශිෂ්‍යවරයා හැටියට එම ස්ථානයට පත්වූ බවත් පැමිණිලිකරු සැලකර සිටියේය. සරණංකර මහ තෙරුන් විසින් එම විහාරයෙහි පදිංචි කරනු ලැබූ සුමන ස්ථවිරයන් වහන්සේ නමැත්තෙකුගේ ශිෂ්‍යයින් වන විත්තිකරුවන් හතරදෙනා වෂ 1959 යේදී සුමන මහ තෙරුන්ගේ ඇවැමෙන් පසු විහාරයට සහ එම විහාර සන්තක දේපල වලට තමාට ඇති අයිතිය ගැන

ආරවුල් කරන බව පැමිණිලිකරු වැඩිදුරටත් පෙන්වා දී සිටියේය.

තමන්ගේ පිළිතුරෙහි විත්තිකරුවන් කියා සිටියේ දයක පිරිස විසින් වෂී 1922 දී සුමන සංවිරයන් වහන්සේ විහාරාධිපතීන් වහන්සේ හැටියට පත් කරනු ලැබ වෂී 1959 සිදුවූ උන්වහන්සේගේ ඇවැමෙන් පසුවද එතැනට ඔවුන් විසින් තුන්වන විත්තිකරු පත් කරන ලද බවකි. පැමිණිලිකරුගේ අයිතිවාසිකම් කීම දැන් කාල නියමයේ සීමාවෙන් පිට පැන ඇති ඉල්ලීමක් බව ද කියා සිටියේය.

පැමිණිලිකරු සාක්ෂි දෙමින් නඩුව පටන් ගැනීමේදී හරස් ප්‍රශ්නවලට පිළිතුරු දෙමින් කීයේ වැලිවිට සරණංකර මහ සංවිරපාදයන් වහන්සේ (තමන්වහන්සේගේ ආචාර්‍යවරයාගේ ආචාර්‍යවරයාණන් වහන්සේ) ගඩලාදෙණිය විහාරය කිරිවැවුල විහාරය සහ ගඩලාදෙණිය විහාරායතන සහ අන් සමහර විහාර වලද අධිපති වී සිටි බවකි. උන්වහන්සේ වෂී 1893 දී දිවංගත වූයේ තමන් වහන්සේගේ ශිෂ්‍යවරයන් හැටියට මේධංකර සංවිරපාදයන් වහන්සේත් සරණංකර මහ සංවිරපාදයන් වහන්සේත් ජීවත්ව සිටියදී බවත් ඒ දෙදෙනා වහන්සේම පැමිණිලිකරු වන තමන්වහන්සේගේ ආචාර්‍යවරයන් බවත් කියා සිටි පැමිණිලිකරු ඒ දෙදෙනා වහන්සේ අතුරෙන් ජ්‍යෙෂ්ඨ ශිෂ්‍යවරයා වශයෙන් විහාරාධිපති ධුරයට මේධංකර සංවිරපාදයන් වහන්සේ පත්වී වෂී 1921 උන්වහන්සේ සුවහිසට වී වදරන තුරුම එම කාර්‍ය භාරයෙහි නිල බලය ඉසිලූ බවත් පැමිණිලිකරු කියා සිටියේ ය.

වැඩිදුරටත් කරුණු කී පැමිණිලිකරු මේධංකර සංවිරයන්ට සහ සරණංකර සංවිරයන් වහන්සේට කුඩා සරණංකර සංවිරයන් වහන්සේ හා පැමිණිලිකරු වන තමන්වහන්සේත් යන ශිෂ්‍යවරයන් දෙදෙනෙකු සිටි බවත් ඉන් පළමුවැන්නා තමාට කලින් පැවිදිකම ලැබූ නමුත් උපසම්පදව තමා සමග එකට ලැබූ බව කීය. පැමිණිලිකරු කියන අන්දමට කුඩා සරණංකර සංවිරයන් වහන්සේ අල්ගම විහාරාධිපතීන් වහන්සේ වූ අතර තමන්වහන්සේ ගඩලාදෙණිය සහ කිරිවැවුල විහාරවලයෙහි අධිපති බව දැරිය යුතු ය.

පැමිණිලිකාර සංඝරාජයන්වහන්සේගේ මේ පිළිගැනීම නිසා මේධංකර හිමියන්ගේ ජ්‍යෙෂ්ඨ ශිෂ්‍ය රත්නය වන කුඩා සරණංකර හිමියන් වහන්සේ උන්වහන්සේ සතුව ඇති අයිතිවාසිකම් යම් කිසි විහාරාරාමයක් පිළිබඳව කැමැත්තෙන් අත් නොහරින ලද්දේ නම් මෙම භික්ෂු පරම්පරාවට අයත් සියළුම පන්සල්වල නියම විහාරාධිපති උන්වහන්සේ බව පැහැදිළිව පෙනේ. එ පමණක් නොව පැමිණිලිකාර සංඝරාජයන් වහන්සේගේ ආචාර්‍ය දෙදෙනා වහන්සේගේ කිරිවැවුල විහාරයට නිතිගත ලෙස විහාරාධිපති හැටියට පත් විය යුත්තේ මේධංකර හිමියන් මිස සරණංකර හිමියන් නොවේ. එ බැවින් සරණංකර සංඝරාජයන් වහන්සේ වෙතින් අයිතිය තමාට ලැබිය යුතු යයි පැමිණිලිකාර සංඝරාජයන් වහන්සේ කරන ඉල්ලීම සාධාරණ ලෙස පවත්වා ගත හැකි ඉල්ලීමක් නොවේ. එයට හේතුව මූලික විහාරාධිපතීන් වහන්සේගෙන් පාරම්පරික අයිතිය ලැබී ඇත්තේ ශිෂ්‍යානුශිෂ්‍ය පරම්පරාවේ ප්‍රඥප්තිය අනුව බව උන්වහන්සේගේම පිළිගැනීම නිසා ය.

නඩුව විභාගයට එළඹෙන මීළඟ දිනයට පෙර පැමිණිලිකරු තමාගේ පැමිණිල්ල සංශෝධනය කිරීමට පරිශ්‍රමයක් දරා තිබේ. එම සංශෝධනයෙන් කියැවෙන්නේ තමන්වහන්සේගේ ආචාර්‍ය වහන්සේ දෙදෙනා අතුරෙන් ජ්‍යෙෂ්ඨ ආචාර්‍යවරයා වූ මේධංකර හිමියන් විහාරාධිපති වූ බවත් උන්වහන්සේගේ ජ්‍යෙෂ්ඨ ශිෂ්‍යයා වන කුඩා සරණංකර හිමි ගඩලාදෙණිය සහ කිරිවැවුල විහාර වලට ඇති අයිතිය කැමැත්තෙන් ම පැමිණිලිකරුගේ වාසියට ඉවත දමා ඇති බවකි. මේධංකර හිමියන්ගේ අභාවයෙන් පසු තමා විහාරාධිපති වූ බව කියන පැමිණිලිකරු තමාගේ ආචාර්‍ය සරණංකර සංඝරාජයන් වහන්සේ තමා වෙනුවෙන් සහ තමාගේ අවසරය පිට ගඩලාදෙණිය සහ කිරිවැවුල යන විහාර වය පරිපාලනය කළ බව ද සංශෝධිත පැමිණිල්ලෙන් කීමට යත්න දරා තිබේ.

උන්වහන්සේ බලාපොරොත්තු වූ සංශෝධනයට විත්තිකරුවන් විසින් ඉදිරිපත් කළ විරෝධය පහත සඳහන් කරුණු අනුව උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා පිළිගෙන තිබේ. එම කරුණු මෙසේ ය :—

(1) පැමිණිලිකරු මූලික පැමිණිල්ලෙන් සැලකර සිටි කරුණු වලින් බැහැරව යාමක් සිදුවී තිබීම.

(2) සංශෝධන කිරීමට කරන ලද ඉල්ලීම නිර්‍ව්‍යාජ ඉල්ලීමක් නොවීම සහ එය තමන්වහන්සේ විසින් කෝන්තර වලට පිළිතුරු දීමේදී පිළිගත් දේ සනාථ කිරීමට කරන ලද ප්‍රයත්නයක් වීම.

උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමාගේ මෙම නියෝගය පිළිගැනීමට මට නොහැකි බව ගෞරවයෙන් සඳහන් කරමි. සංශෝධනය පිළිබඳ සම්ප්‍රදය කෙරෙහි බලපවත් වන වැදගත් ප්‍රඥප්තියක් විනිශ්චයකාරවරයා මෙහි දී ගණනකට ගෙන නොමැත. එසේම නඩු කීමෙහි නියම පරමාර්ථය එහිදී පැන නගින කල්පිත ප්‍රශ්න ඉවනට දමා විසඳීමට ඇති නියම ප්‍රශ්නයන් පිළිබඳව විනිශ්චයාත්මකව සලකා බැලීම ය. යම් හෙයකින් කලින් ඉදිරිපත් කරන ලද ආයාචනාවක වරදක් දෘෂ්‍යමාන වේ නම් එය නිවරද කිරීමෙහි ඇති දෙසක් නැත. එය කළ යුත්තේ මෙහිලා කී එම පරමාර්ථයන් ඉටු කිරීම පිණිස ය. එහෙත් අනිත් පක්ෂයට මෙයින් අයුක්තියක් සිදුකිරීම නොමැනවි. ඒ පාර්ශවයට ගාස්තුව සඳහා සාමාන්‍යයෙන් ලැබෙන නියෝගයකින් සෑහෙන වන්දියක් ලැබේ.

කලින් ආයාචනයෙහි පැමිණිලිකරු සඳහන් කරන ලද්දේ ඔහුගේ ආචාර්‍යවරයා වන සරණංකර හිමි විහාරාධිපති කෙනෙකු බව ය. ඉන් පසු ඉදිරිපත් කරන ලද සංශෝධනයෙන් උන්වහන්සේ සැලකර සිටින්නේ සරණංකර හිමියන් තත්ත්වාකාරයෙන් (de facto) විහාරාධිපති ධුරය ඉසුලූ අතර මේධංකර හිමියන් නීත්‍යානුකූල විහාරාධිපති බවකි. තවදුරටත් සළකා බලන කල මේධංකර හිමියන්ට අනුව විහාරාධිපතිකම ලැබීමට නම් පැමිණිලිකරු සාර්ථක ලෙස උන්වහන්සේගේ ජ්‍යෙෂ්ඨ සම ශිෂ්‍යවරයා වන කුඩා සරණංකර හිමියන් තමාගේ අයිතිවාසිකම් තැමැත්තෙන් අතහැරිය බව හෝ පැහැර හැරිය බව හෝ සාර්ථක ලෙස ඔප්පු කළ යුතු ය. පැමිණිලිකරු විසින් තමන්වහන්සේට අයිතිය පැවරීමේ පිළිවෙළ කලින් සැලකර සිටි ක්‍රමයෙන් වෙනස්වීමක් උන්වහන්සේ විසින් අදහස් කරන ලද සංශෝධනයෙන් ඇති වන බව සැබෑ ය. නමුත් බොහෝ සංශෝධනවලින් මීට සමාන යම් කිසි වෙනස් වීමක් ඇති වීමට පිළිවන. මෙහි නඩු නිමිත්ත එකම වන අතර පාර්ශවකරුවන් ද එම උදව්යම ය. එ බැවින් සරණංකර හිමියන්ගේ නිවැරදි තත්ත්වය ගැන සිදුවී ඇති වරද නීතිය පිළිබඳව ඇති කර ගත් සදෙස් හැඟීමකින් සිදුවුණා විය හැක. ඒ මන්ද? යම් කිසි පන්සලක (පාලක විහාරාධිපති තැන) නීත්‍යානුකූල විහාරාධිපති වීම අනවශ්‍ය යැයි එක් අවධියක අදහස් කර තිබේ. එම නිසා නියම කරුණු වල තත්ත්වයෙහි නීත්‍යානුකූල අවබෝධයක් ඇති කර වීමට මෙහිදී අදහස් කරන ලද සංශෝධනයෙන් පරිශ්‍රමයක් දරා තිබේ යැයි ගිණිය හැක.

පැමිණිලිකරුගේ නීති අනුශාසකයන් නඩුව වැඩිදුර යාමට පෙර එහි නියම තත්ත්වය කෙබඳු දැයි ඔවුන්ට වැටහෙන අයුරින් ගෙනහැර පෑමට යුතුව ක්‍රියා කොට ඇති බව පැමිණිලිකරුගේ වාසියට කිව යුතුව තිබේ. යම් හෙයකින් අදහස් කරන ලද මෙම සංශෝධනය ප්‍රමාද කළේ නම් ඔවුන් එම සංශෝධනය නිර්‍ව්‍යාජ සිතකින් නොකරන ලදැයි උගත් විනිශ්චයකරු ගත් මතයෙහි යම් කිසි සාරයක් තිබෙන්නට පිළිවන. මෙම සංශෝධනයට ඉඩදීමෙන් විත්තිකරුවන්ට කිසිම අයුක්තියක් සිදුවේ යැයි කීමට නුපුළුවන. ඔවුන් අයිතිවාසිකම් කියන විහාර දේපල ගම් දැනටමත් ඔවුන් විසින් භුක්තිවිඳගෙන එන බව මීට හේතුව ය. එම නිසා සංශෝධනය කරන ලද දින ඔවුනට තිබූ අයිතිවාසිකම් වලට හානියක් ඇතිවේ යැයි කොයිලෙසකින්වත් සිතිය නොහේ.

එමනිසා මෙම ඇපෑලට ඉඩදෙන මම වසී 1961 ඔක්තෝම්බර් 4 වන දින දරණ සංශෝධිත පැමිණිල්ල පිළිගන්නා ලෙස නියෝග කරමි. මෙම සංශෝධනය ප්‍රමාදව කිරීම හේතුකොටගෙන වැලකිය හැකිව තිබුණ වියදමක් විත්තිකරුවන්ට දැරීමට සිදුවූ නිසා නිෂ්ඵල වූ එම නඩුවෙහි ගාස්තුව තක්සේරු කර දෙමසක් ඇතුලත දී පැමිණිලිකරු විසින් ඔවුනට එය ගෙවිය යුතුය. එසේ කිරීමට ඔහුට නොහැකි වුවහොත් සංශෝධිත පැමිණිල්ල නඩුවෙන් ඉවත් කොට දමනු ඇත. 1961 ඔක්තෝම්බර් 16 වෙනි දින පවත්වන ලද පරීක්ෂණය පිළිබඳව හෝ මෙම ඇපෑල පිළිබඳව හෝ අයවිය යුතු ගාස්තුව ගැන මම මෙහිදී නියෝගයක් නොකරමි.

ගරු එච්. ඇන්. ජී. ප්‍රනාඳු විනිශ්චයකාරතුමා:

මම එකහවෙමි.

ඇපෑලට ඉඩ දෙන ලදී.

ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා ඉදිරිපිට

රාජින එ. දෙන් ලීලරත්න*

ශ්‍රේ: ආ: ඉල්ලුම් පත්‍රය/සාමාන්‍ය/5/ 64—
ඒකාබද්ධ මහේස්ත්‍රාත් උසාවිය, කොළඹ, පරිශෝධනය, අංක 27178 සහ 27374.

විවාද කොට තීන්දු කළේ : 1964 පෙබරවාරි 28.

දණ්ඩනීති සංග්‍රහයේ 367, 394 වන ඡේද—අපරාධ නඩු විධාන සංග්‍රහය, 325 ඡේදය—විත්තිකරුවකු විසින් මොටෝ රිය දෙකක් සොරකම් කරණ ලදැයි කියා හෝ එසේ නැතහොත් එම මොටෝ රිය සොර බඩු වශයෙන් තමා ළඟ තබාගන්නා ලදැයි කියා හෝ ඔහුට විරුද්ධව චෝදනා ඉදිරිපත් කළ විට එම ඡේදයේ පිටුවහල සෙවිය හැකි ද?—විත්තිකරු තමා වරදකරු යයි කියා සිටීම—දෙන ලද දඩුවමෙහි අප්‍රමාණවත්කම—විත්තිකරුට විරුද්ධව ඇති පිළිගත හැකි සාක්ෂි මහේස්ත්‍රාත්වරයා කල්පනාවට නො ගැනීම—දඩුවම් දීමේදී විනිසකරු විසින් කල්පනාවට භාජන කළ යුතු කරුණු—පහළ උසාවිවල නඩු විභාග සඳහන් වාර්තා සිය කැමැත්තෙන් ම ගෙන්වා පරීක්ෂා කිරීමට ශ්‍රේෂ්ඨාධිකරණයට ඇති බලය.

මොටෝ රිය දෙකක් සොරකම් කරණ ලදැයි කියා හෝ එසේ නැත්නම් හොර බඩු තමා ළඟ තබා ගන්නා ලදැයි කියා විත්තිකරුට විරුද්ධව කොළඹ ඒකාබද්ධ මහේස්ත්‍රාත් උසාවියේ නො: 27178 සහ නො: 27374 යන නඩු දෙකක් පවරණ ලදී.

පළමු වන නඩුවට හේතු භූත වූයේ රු: 10,000/- ක් වටිනා නො: 2 ශ්‍රී 6014 දරණ මොටෝ රියක් කොළඹින් 11.2.1963 වන දින සොරකම් කරණු ලැබීම ය. විත්තිකරු නෝර්ටන් බ්‍රිජ්හි දී 31.3.63 වන දින එම මොටෝ රිය 3 ශ්‍රී 8694 දරණ නොම්මර තහඩුව ඇතුව පදවා ගන යන බව සහ ඔහුගේ එම කාරයේ බඩු පෙට්ටියේ ඊ. ඇන්. 9804 දරණ තවත් නොම්මර තහඩු දෙකක් ඇති බව ද අසුවී තිබේ. විත්තිකරු උසාවියට ඉදිරිපත් කරණ ලදුව 16.4.63 වන දින රු: 3,000!- ක් සහතික ඇපයක් පිට නිදහස් කරණ ලදී.

දෙවන නඩුවට හේතු භූත වූයේ විත්තිකරුට ඇප දී සදිනකට පසු 22.4.63 දරණ දින කොළඹ කොටුවෙන් 1 ශ්‍රී 8439 දරණ රු: 10,000/- ක් වටිනා මොටෝ රියක් සොරකම් කිරීම ය. ලබන ලද යම් කිසි ඔත්තුවක් අනුව පොලිසිය බොරැල්ලේ සැඟවී සිට එම මොටෝ රිය ගරාජයකින් විත්තිකරු විසින් පදවා එලියට ගැනීමේදී 24.5.63 දින අල්ලා ගන්නා ලදී. විත්තිකරු මොටෝ රිය සොරකම් කරණ ලද දිනයන් සඳහන් කරණ ලද දින පොතක් මොටෝ රිය ඇතුලේ තිබී පොලිසියට අසුවිය.

දෙවෙනි නඩුවේ දී තම භාර්‍යාව ඇපකාරිය හැටියට භාරගෙන රු: 500/- ක ඇපයක් පිට විත්තිකරු මුදා හරින ලදී.

වෂී 1963.8.6 දරණ දින එම නඩු දෙකම මහේස්ත්‍රාත්වරයා ඉදිරියට එළඹිනි. අපරාධ නඩු විධාන සංග්‍රහයේ 152 (3) ඡේදය යටතේ මහේස්ත්‍රාත්තුමා දිස්ත්‍රික් නඩුකාරතුමෙකු වශයෙන් ආඥා බලය තමා පිට පවරා ගෙන තිබුනි. කලින් තමා නිවැරදිකරු යයි සැලකර සිටි විත්තිකරු එම සැලකිරීම ඉවත් කොට ගෙන මෙහි දී නඩු දෙකටම තමා වරදකරු බැව් කියා සිටියේ ය. මෙසේ සැලකර සිටීම සොර බඩු තමා ළඟ තබා ගෙන සිටීමේ චෝදනා වලට වැරදිකරු බව පිළිගත් හැටියට සැලකිරීමකැයි සලකා ගත් මහේස්ත්‍රාත්වරයා එසේ කර ඇත්තේ මේ මොටෝ රිය සොර බඩු බව පිළිගත් නිසා හෝ එසේ පිළිගැනීමට කරුණු තිබුනු නිසා ය. ඉක්බිති විත්තිකරු හඳුනාගැනීම හා දඩුවම් දීම මහේස්ත්‍රාත්වරයා 9–8–63 දිනට කල් දැමී ය. මේ දිනට ලැබෙන ලෙස ඔහු පරිවාසක නිලධාරියාගෙන් වාර්තාවක් ද ඉල්වීය.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 66 වෙනි කා., 57 වෙනි පිට බලනු.

චිත්තිකරුට හිතකර නො වන සටහන් ඇතුළත් ව තිබූ එම වාර්තාවෙහි චිත්තිකරු පරිවාස ආරක්ෂාව යටතේ තැබීම මැනවැයි මේ පරිවාසක නිලධාරියා නො කී නමුත් මහේස්ත්‍රාත්වරයා චිත්තිකරු පිළිබඳ ව අපරාධ නඩු-විධාන සංග්‍රහයේ 325 වන ඡේදයට අනුව ක්‍රියා කිරීමට සැරසුනේ ය. එම වාර්තාවේ සඳහන් වී ඇති පරිදි "චිත්ති-කරුට භයින් ජීවත් වන ඔහුගේ භාර්‍යාව මහේස්ත්‍රාත්වරයා ඇපකාරිය හැටියට පිළිගෙන රු: 500/- ක ඇපයක් පිට ඉන්පසු හොඳ කල්ක්‍රියාවෙන් සිටින ලෙස තුන් අවුරුද්දකට චිත්තිකරුගේ ඇහ බැන්දේ ය. පළමු වන නඩුවේ රජයේ ගාස්තුව වශයෙන් මසකට රු: 20/- බැගින් ගෙවෙන හැටියට රු: 250!- ක් ගෙවිය යුතු යයි චිත්තිකරුට නියම කළ මහේස්ත්‍රාත්තුමා දෙවන නඩුවට ද රජයේ ගාස්තු වශයෙන් මසකට රු: 5/- බැගින් ගෙවෙන සේ රු: 100/- ක් නියම කෙළේය.

ශ්‍රේෂ්ඨාධිකරණය මෙම නඩු දෙකේ නඩු පොත් සිය කැමැත්තෙන් ම ගෙන්වා එම අධිකරණය වෙත අපරාධ නඩු විධාන සංග්‍රහයේ 356 වන ඡේදයෙන් පැණවී ඇති බලය පිට පහත සඳහන් තීන්දුව දුන්නේ ය:—

තීන්දුව:— (1) (ඒ) චිත්තිකරුට විරුඩව ඉදිරිපත් කර ඇති චෝදනාව සුළු වරදක් පිළිබඳව නො වන නිසාත්; (බී) මෙම මොටෝ රිය සොරකම් කරණ ලද්දේ චිත්තිකරු විසින් යයි පිළිගත හැකි සාක්ෂි තිබුන නිසාත්; (සී) පරිවාසක නිලධාරියාගේ වාර්තාවෙන් මේවා අපරාධ නඩු විධාන සංග්‍රහයේ 325 ඡේදය යටතේ ක්‍රියා කිරීමට සුදුසු නඩු නො වන බව පෙනී යන නිසාත්; මේ එක් එක් නඩුවක සොරකම් කිරීමේ වරදට චිත්තිකරු අවුරුදු දෙක බැගින් සිරදඩුවම් අපරාධ නීති සංග්‍රහයේ 367 වන ඡේදය යටතේ දිය යුතුව තිබේ. දෙවන නඩුවේ දඩුවම පටන් ගන්නේ පළමු වෙනි නඩුවේ දඩුවම ගෙවී අවසාන වූ පසුවය.

(2) ගරුක අපරාධ පිළිබඳව අපරාධ නඩුවිධාන සංග්‍රහයේ 325 වන ඡේදයේ පැණවීම් අදළ නොවේ.

(3) දෙවෙනි නඩුවේ චිත්තිකරුට ඇප දීමේදී මහේස්ත්‍රාත්තුමා තමා සතු අභිමතිය කිසිසේත් සලකා බැලුවේ නැත. එපමණක් නොව 367 සහ 394 ඡේදයන්හි සඳහන් අපරාධ පිළිබඳව ඇප දීමක් නො කළ හැකි බව ද ඔහු අවබෝධ කර ගෙන නැත.

දඩුවම් දීමෙහිදී විනිශ්චයකරුවන් විසින් කල්පනාවට ගත යුතු කුමන කරුණු දැයි විනිශ්චයකාරතුමා පහත සඳහන් පරිදි පෙන්වා දුන්නේ ය:—

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා:— "දඩුවමක් දීමේදී විනිසකරුවන් විසින් කල්පනාවට ගත යුතු කරුණු මොනවා ද යන්න පෙන්වා දීමට ද මම කැමැත්තෙමි. මේ සඳහා ඇටෝර්නි-ජනරාල්වරයා එ. එච්. ඇන් ද සිල්වා, 57 න.නි.වා. 121 පිටේ, ඇති නඩුවෙන් කරුණු උපුටා දැක්වීමට මා සුදුනම් ය. එම නඩු වාර්තාවෙහි 124 වන පිටේ ගරු බ්‍රිස්නායක වැඩ බලන අග්‍ර විනිශ්චයකාරතුමා (එතුමා එවකට සිටි පරිදි) මෙසේ කියා තිබේ: වරදකරුවෙකුට දඩුවම් පමුණුවන දඩුවමේ තත්ත්වය සැලකීමේදී එම දඩුවම මහජනතාව පිළිබඳ අංශයෙන් සහ වරදකරුගේ අංශයෙන් යන අංශ දෙකින් ම සළකා බැලිය යුතු ය. බොහෝ විට විනිසකරුවෝ මෙම ප්‍රශ්නය වරද-කරුගේ අංශයෙන් පමණක් බැලීමට කැමත්තාහ. සුදුසු දඩුවම තීරණය කිරීමෙහිදී විනිසකරුවෙකු විසින් වරදකරු කරන ලද වැරදී ක්‍රියාවක ස්වභාවය අනුවම එහි ඇති බරපතල කම ගැන සලකා චෝදිතයාට විරුඩව චෝදනා ඉදිරිපත් කරන ලද හෝ දණ්ඩ නීති සංග්‍රහයෙහි හෝ වෙනත් ආඥා පණතක පනවා ඇති දඩුවම ගැන ද කල්පනාවට ගත යුතු ය.

(2) : විනිසකරුවා විසින් දෙනු ලබන එම දඩුවම නිවර්තක (**deterrent**) දණ්ඩනයක් ලෙස බලපවත්වා ද යන්න ගැන සලකා එය කොතරම් දුරට ක්‍රියාකාරී වේද යන්න ද සිතා ගත යුතු ය.

(3) : චෝදිතයා වරදකරු හැටියට විනිශ්චය වී ඇති අපරාධයෙහි ස්වභාවය ගැන සලකා එ බඳු අපරාධ කෙතරම් තත්ත්වයක සමාජයේ කෙරේ ද යන්න ද ඔහු විසින් සැළකිය යුතු ය.

(4) : එ බඳු අපරාධකරුවන් අල්ලා ගැනීමෙහි ඇති දුෂ්කරතාවය ද විනිසකරුගේ අවධානය යොමු විය යුතු කරුණකි. අපරාධකරුවාගේ චරිත ශෝධනය ද වැදගත් කරුණක් ලෙස නිසැකයෙන් ම සලකා ගත හැකි වුවත් එය මා විසින් සඳහන් කරන ලද අනිත් කරුණු වලට වඩා පහතින් ගිණිය හැකි කරුණකි. යම් හෙයකින් මහජන සුහසිද්ධිය හෝ රටෙහි අර්ථසිද්ධිය (මේ දෙකම එක් දෙයක් ලෙස ගැනේ) අපරාධකරුවාගේ මුලින් පැවති යහපත් චරිතය කලින් හැසිරීම සහ වයස යන කරුණු වලට වඩා ගරුක තත්ඛයක තිබෙන අවස්ථාවක ඇත්ත වශයෙන් ම මහජන සුහසිද්ධියට මුල් තැන ලැබිය යුතු ය. (මෙහි නොම්මර දමා ඇත්තේ මා විසිනි).

මේ කරුණු වලට පහත සඳහන් කරුණු ද ගෞරව පෙරටුව මට එකතු කළ හැක.

(5) : අපරාධයට ගොදුරු වූ තැනැත්තාට සිදු වූ පාඩුව.

(6) : සාහසිකයාට තම ක්‍රියාවෙන් ලැබිය හැකි ප්‍රතිලාභය.

(7) : සොර බඩුවක් කෙබඳු විධියකින් ප්‍රයෝජනයට ගත හැකි ද යන්න.''

නීතිවේදියෝ:— ඩී. ආර්. විජේගුණවර්ධන මහතා, චෝදිතයා වෙනුවෙන්.
රජයේ අධිනීතිඥ ඩී. ඇස්. විජේසිංහ මහතා, අධිකරණ සහායක වශයෙන්.
නිවේදනය ලැබූ චෝදිතයා පැමිණ සිටී.

සඳහන් කළ නඩු:— ප්‍රනාන්දු එ. අල්විස්, 4 සී. ඇල්. ජේ. 111.
ඇටෝර්නිජනරාල්තුමා එ. ද සිල්වා, 57 න.නි.වා. 121.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා

වර්ෂ 1963 අගෝස්තු 6 වෙනි දින සහ ඉන් පසුව ද කොළඹ ඒකාබඩ මහේස්ත්‍රාත්වරයා මේ නඩු දෙක එකට සළකා එකම දිනයෙහි විභාග කරන ලද නිසා මම ද ඒ නඩු දෙක එකට ගෙන විභාගයට භාජන කරමි.

එම නඩු දෙක ක්‍රියාත්මක ලෙස සලකා බැලීමේ අදහසින් මා විසින් මේ පිළිබඳ ව සිදුවී ඇති සිද්ධීන් දින පිළිවෙලින් බහා දැක්වීම සුදුසු යැයි හහිමි. නෝ: 27178 දරණ නඩුවෙහි රුපියල් 10,000 කට වඩා වටින මෝටර් රියක් 11.2.63 දරණ දින කොළඹ කොටුවේදී සොරකම් කරනු ලැබූ විත්තිකරු එම කාර් එක තමාගේ සාමිත්ඛයෙහි තිබියදී ම සොයා ගන්නා ලදී. කලින් මෙම කාර් එකෙහි තිබූ නොම්මර තහඩුව 2 ශ්‍රී 6014 වූ අතර එය සොරකමෙන් පසු සොයාගනු ලබන විට එහි වූයේ 3 ශ්‍රී 8694 දරණ නොම්මර තහඩුවකි. මෙම මෝටර් රිය සොයා ගැනීම ඒ සඳහා ලබන ලද ඔත්තුවක් අනුව සිදුවී තිබේ. සවස 3.25 ට නෝටන්බ්‍රිජ් ප්‍රදේශයෙහි සැහවී සිටි පොලිස් කණ්ඩායමට කාර් එක සොයා ගැනීමේ දී එහි බඩු දමන කොටසෙහි තිබී ඊ ඇන් 9804 දරණ නොම්මර තහඩු දෙකක් දක්නට ලැබී තිබේ. රිය පදවමින් සිටියේ චෝදිතයා ය. ඔහු 3.4.1963 දරණ දින උසාවියට ඉදිරිපත් කරන ලදුව රුපියල් 3,000/- ක (සහතික) ඇපයක් පිට 16.4.1963 දරණ දින ඉවත හරින ලදී.

නෝ: 27374 දරණ නඩුවේ ප්‍රශ්නයට භාජන වී ඇති ද්‍රව්‍ය වන නොම්මර 2 ශ්‍රී 8430 දරණ මෝටර් රථය 22.4.1963 දරණ දින එනම් විත්තිකරුට ඇපදී දවස් 6 කට පසුව කොළඹ කොටුවේ දී සොරකම් කරන ලදී. මෙම මෝටර් රථය ද රු: 10,000/- ක් පමණ වීළ කළ හැක. ලබන ලද ඔත්තුවක් අනුව බොරැල්ලේ දී 24.5.63 දරණ දින සැහවී සිටි පොලිසියට සවස 5.30 ට චෝදිතයා ගරාජයකින්—බෙස්ලයින් මෝටර්ස් නමැති ගරාජයෙන්—පිටතට එම රථය පදවා යෙන යද්දී ඔහු අල්වා ගත්තේ ය. එම මෝටර් රථයෙහි තිබුණ නොම්මර තහඩුවම සවි කොට තිබුණි. මෙම මෝටර් රථයෙහි දක්නට ලැබුණු දින පොතක විත්තිකරු

විසින් මෝටෝ රිය සොරකම් කරන ලද දවස් ලියා තිබිණි. මෙම දින පොත මහේස්ත්‍රාත් උසාවියේ දී ඉදිරිපත් කරන ලදුව මහේස්ත්‍රාත්වරයා විසින් එම දින පොතෙහි තිබූ කරුණු මොනවා ද යන්න ගැන පරීක්ෂණයක් නො කරම චෝදිතයාගෙන් නඩු දෙකට ම වරදකරු බව පිළිගෙන කරන ලද යාඥුවක් බාරගෙන එම යාඥුව සොර බඩු තමා ලඟ තිබුණ බව කියන යාඥුවක් හැටියට සළකා කටයුතු කර තිබේ. නමුත් මේ එක් එක් නඩුවක විත්තිකරුට විරුඬව චෝදනා කර තිබෙන්නේ සොරකම හෝ එසේ නො මැති නම් සොර බඩු තමා ළඟ තබා ගැනීම පිළිබඳව ය.

මා විසින් ලබන ලද යම්කිසි ආරංචියක් අනුව මෙම උසාවිය මහින් එම නඩු දෙකෙහි නඩු පොත් ඉල්ලා යවන ලද නමුත් මහේස්ත්‍රාත්වරයා එම දින පොත නො එවී ය. එම දින පොත එවන ලෙස ඉන්පසු ව නිවේදනයක් යවන ලද්දේ මෙම දින පොතෙහි යම්කිසි තොරතුරක් සඳහන් වී තිබීමට ඕනෑ යයි මා සිතූ නිසා ය. මේ උසාවියෙහි පොලිස් ඉන්ස්පැක්ටර් මහතා විසින් දෙන ලද තොරතුරු සහ දින පොතෙහි ඇති සටහන් පරීක්ෂා කර බලන විට එසේ කිරීම යුක්ති සහගත යයි හැඟේ.

මෙම නඩු දෙකින් පළමු වැන්නෙහි අයිවකින්ස් ස්පෙන්ස් මහතුන්ගේ නමින් නිකුත් කරන ලද මෝටර් රිය ගාස්තුව පිළිබඳ අවසර පත්‍රයෙහි ඇති සටහන් වෙනස් කර තිබෙනු පෙනිනි. මෙම මෝටර් රථය පාවිච්චි කරන ලද්දේ එම වෙළඳ සමාගමෙහි සේවයේ නියුක්ත රොනල්ඩ් ලෝ නම් මහතෙකු විසිනි.

මෙම නඩුවලින් දෙවැන්නෙහි භාය්‍යාව ඇපකාරිය වශයෙන් තබා රුපියල් 500/- ක් ඇප පිට විත්තිකරු ඉවත හරින ලද නමුත් මුල් නඩුවේ දී ඔහු එවකට රුපියල් 3,000/- ක ඇපයක් පිට සිටි කෙනෙකු බව සැලකිය යුතු ය. මෙය මාගේ අදහසේ හැටියට එක්කෝ විත්තිකරුට මෙබඳු අපරාධ තව තවත් කිරීමට කරන ලද ආරාධනයකි. එසේ නැතහොත් ධෛර්‍යය දීමකි. අපරාධ නඩුවිධාන සංග්‍රහයෙහි උපලේඛනයට මහේස්ත්‍රාත්වරයා තම සිත යොමු කෙළේ නම් 367 සහ 394 දරණ ඡේදයන් යටතේ ඉදිරිපත් කෙරෙන චෝදනා ඇප නොදිය යුතු චෝදනා බව පෙනී යනු ඇත. ඇප නො දිය යුතු අපරාධ වල දී පවා විත්තිකරුවන්ට පවා ඇප දීමේ ක්‍රියා පිළිවෙල මම මෙහි දී අමතක නොකරමි. එහෙත් එබන්දක් කෙරෙන්නේ මහේස්ත්‍රාත්වරයාගේ අභිමතය පරිදි ය. දෙවැනි නඩුවෙහි දී චෝදිතයාට ඇප දීමෙහි දී මහේස්ත්‍රාත්වරයා තමාට ඇති මෙම අභිමතය ගැන කිසිසේත් සළකා බලා නැත.

මේ නඩු දෙකින් පළමු වැන්නේ සාක්ෂි ඉදිරිපත් කළේ 27.5.1963 වන දින දී ය. මෙහි දී මහේස්ත්‍රාත්වරයා 152 (3) දරණ ඡේදය අනුව ආඥා බලය තමා පිට පවරා ගත්තේ ය. ඉක්බිති විත්තිකරු චෝදනාවට නිවැරදිකරු යයි කියා සිටියෙන් නඩුව විභාග කිරීමට නියම විය. දෙවැනි නඩුවේ දී 25.6.63 දරණ දින සාක්ෂි ඉදිරිපත් විය. එහි දී ද අපරාධ නඩු විධාන සංග්‍රහයේ 152 (3) දරණ ඡේදය අනුව ආඥා බලය පවරා ගත් මහේස්ත්‍රාත්වරයා ඉදිරියේ විත්තිකරු චෝදනාවට නිවැරදිකරු යයි කියා සිටියෙන් එම නඩුව ද විභාග කිරීමට සිදු විය. නඩු දෙකම මහේස්ත්‍රාත්වරයා ඉදිරියට නැවත ආයේ 6.8.63 දින දීය. එ දින චෝදිතයා මෙම නඩු දෙකට ම වරදකරු යයි කියා සිටියේ ය. මහේස්ත්‍රාත්වරයා මෙම නඩු දෙකේම කරන ලද වරද පිළිගැනීම චෝදිතයා විසින් සොර බඩු යයි දැන දැන හෝ එසේ විශ්වාස කිරීමට සැහෙන කරුණු තිබියදී තමා ලඟ ඒවා තබා ගැනීම හැටියට සලකා තිබෙන සේ පෙණේ.

දණ්ඩ නීති සංග්‍රහයේ 367 වන ඡේදයට හෝ 394 වන ඡේදයට අසු වන පරිදි කෙරෙන අපරාධ වලට ලැබෙන දඬුවම තුන් අවුරුද්දක සිර දඬුවමක් බව මෙහිලා සඳහන් කිරීම මැනවි. මෙම අපරාධ වලට දෙන දඬුවමේ වෙනසක් නො කිරීම ව්‍යවස්ථාදායක මණ්ඩලයේ සනුවණ කමකි. මෙම දින පොතේ සඳහන් කරුණු කුමක් ද යන්න සළකා ගැනීමට මහේස්ත්‍රාත්වරයා කිසියම් ආයාසයක් ගත්තේ නම් මෙම ආයාචන චෝදිතයා ළඟ සොර බඩු තිබීම ගැන පමණක් කරන ලද ආයාචනා හැටියට මහේස්ත්‍රාත්වරයා නො පිළිගනු ඇත. එයට හේතුව තමා මොටෝ රිය සොරකම් කළ දින පිළිබඳ ව සැහෙන පමණ සාක්ෂි තමාගේ ම අත් අකුරෙන් විත්තිකරු ලියා තිබීමයි.

මේ එක් එක් නඩුවක් ගැන මහේස්ත්‍රාත්වරයා මෙසේ නියෝග කළේ ය : '' හඳුනා ගැනීම සහ දඩුවම් දීම 9.8.63 වන දින සිදු කෙරේ ''.

මින්පසු 9.8.63 වන දින ඔහු පරිවාසක නිලධාරියා-ගෙන් වාර්තාවක් ඉල්ලුයේ ය. පරිවාසක නිලධාරියාගේ වාර්තාව සෑහෙන තරම් වැදගත් කරුණු අඩංගුව තිබේ. නමුත් මහේස්ත්‍රාත්වරයා එම වාර්තාව කිසි-සේත් නොසලකා තිබෙන බව පෙනී යේ. පරිවාසක නිලධාරියෙකු යටතට පත් කිරීමට තරම් චෝදිතයා සුදුසු අයෙකු නොවන බව පරිවාසක නිලධාරියා වාර්තා කළේ ය. ඔහු වාර්තා කළේ ''මෙම වරදකරු ගැන ඔහුගේ භාර්‍යාව භයෙන් කල්යවයි'' යනුවෙනි. වැඩි-දුරටත් වාර්තා කළ ඔහු කියේ : ''ඔහු ටැක්සි රථ පැදවීමට පටන් ගත්තේ මෙයට අවුරුද්දකට පෙර බව පරීක්ෂණයෙන් අනාවරණය වෙයි. මෙම වරදට ඔහු පටලැවුණේ ඒ තත්ත්වයේ වැඩ කටයුතු කරන අවස්ථා-වේය. ඔහුගේ ජීවිතයේ නුදුරු කාලයේදී තමා නිතර කටයුතු පිළිබඳ ව වංචනශීලී වූවා පමණක් නොව ඔහු මොටෝ රිය සොරා ගෙන යාමේ නිරත වූ නොහොබිනා මිත්‍රයන් සමග ද සමාගම් පැවත්විය. චෝදිතයා තමාගේ අතීතය පිළිබඳ තොරතුරු සම්පාදනයෙහි ඉතාම අසත්‍යවාදී වී ඇති බව ද පරීක්ෂණයෙන් අනාවරණය වේ. මෙය පරිවාසක පරිපාලනය පසුබිම් කොට සැළ-කීමෙහි දී තෘප්තියට හේතු නොවන තත්ත්වයක් බව කිව යුතු ය. ඇත්ත වශයෙන් ම පරීක්ෂණ වල අවසාන භාගයේදී චෝදිතයාට විරුඬව දැනට ඇසීගෙන යන නඩුවක් ඇති බව හෙළි විය. එ හෙත් මෙය සොයා ගත්තේ වරදකරුගෙන් නොව අනික් තැන් වලිනි. මේ ලෙස සහයෝගය නොදැක්වීමේ ක්‍රියා පටිපාටිය නිසාත් මහනුවර මහේස්ත්‍රාත් උසාවියේ 12283 දරණ නඩුව ඔහුට විරුඬව ඇති නිසාත් චෝදිතයා පරිවාසක නිලධාරියෙකු යටතේ තැබිය යුතු යයි කියා සිටීමට මෙය සුදුසු නඩුවක් නොවේ. මහනුවර නඩුව පවරා තිබෙන්නේ ඔහු හොර අත්සන් ගසන ලද චැක්පතක් වංචනික අදහසින් ප්‍රයෝජන ගැනීම පිළිබඳව ය. මෙම නඩුව විසඳීම සඳහා එය දිස්ත්‍රික් උසාවියට යවා තිබේ. මේ නිසා මෙම නඩුවේදී පරිවාසක පාලනය මැනවැයි වාර්තා නොකෙරේ,,.

මෙම වාර්තාව තමා ඉදිරිපිට පෙනී පෙනී තිබියදීත් මහේස්ත්‍රාත්වරයා චිත්තිකරු පිළිබඳව අපරාධ නඩු විධාන සංග්‍රහයේ 325 වන ඡේදයට අනුව කටයුතු කිරීමට ඉටාගෙන තිබේ. ඔහු ''චෝදිතයාට බයින් කල්යවන'' ඔහුගේ භාර්‍යාව රුපියල් 500/- කට ඇපකාරිය හැටියට පිළිගෙන අවුරුදු 3 ක් මනාකල්ක්‍රියාවෙන් සිටින ලෙස මහේස්ත්‍රාත්වරයා චෝදිතයාගේ ඇඟ බැඳ තිබේ. පළමු වන නඩුව ගැන ඔහුට රජයේ ගාස්තුව වශයෙන් මසකට රුපියල් 20/- බැගින් ගෙවෙන සේ රුපියල් 250/- ක් ද, දෙවන නඩුවට රජයේ ගාස්තු වශයෙන් මසකට රුපියල් 5/- බැගින් ගෙවෙන සේ රුපියල් 100/- ක් ද ගෙවීමට නියම කර තිබේ.

චෝදිතයා වෙනුවෙන් පෙනී සිටි විජේගුණවර්ධන මහතා චෝදිතයාට දයාව දක්වන ලෙස කරුණු සැළ කරමින් **ප්‍රනාන්දු රහස් පරීක්ෂකයා එ. අල්විස් සහ තවත් අයෙකු** පිළිබඳ ව (4 Ceylon Law Journal, 111 පිටේ) වාර්තා වී ඇති නඩුව ඉදිරිපත් කොට එහි 112 වන පිටේ සඳහන් පරිදි පරිශෝධන අධිකරණයක් මැදහත් වන්නේ යම් නඩුවකදී පවරා ඇති දඩුවමක් නොසෑහේ යයි ප්‍රකටව පෙනෙන විට පමණක් බවත් එම වරද ගැන එයට වැඩි දඩුවමක් දීමට පුළුවන් කමක් ඇති බව දුටු විට පමණක් හෝ වන බවත් කියැවෙන පාඨ කීපයකට මගේ අවධානය යොමු කළේ ය.

මෙකී ප්‍රකාශයට මම ගෞරවයෙන් එකඟ වෙමි. නමුත් මෙම නඩුවේදී පවරා ඇති දඩුවම් ප්‍රමාණවත් යයි පැහැදිළි ව පෙනේ ද? මගේ නිගමනය නම් මෙම දඩුවම් ඉතාම පැහැදිලි ලෙසත් නින්දනීය ලෙසත් අප්‍රමාණවත් ය යනු යි.

අපරාධ නඩු විධාන සංග්‍රහයේ 325 වන ඡේදය ගරුක අපරාධයන්ට අදළ නොවන බව නැවත නැවතත් පෙන්වා දී තිබේ. එම ඡේදයෙහි ඇතුලත් වගන්ති මෙහි බැලීම සමහර විට ප්‍රයෝජවත් විය හැක.

325 (1) '' මහේස්ත්‍රාත් උසාවියක යම් කිසි මනුෂ්‍ය-යෙකු එම උසාවිය මගින් දඩුවම් දිය හැකි වරදකට චෝදනා ඉදිරිපත් කරනු ලැබ සිටි විට ඔහුට විරුඬව ඇති එම චෝදනාව ඔප්පු වී තිබේ යයි එම උසාවිය කල්පනා කරන නමුත් එසේ චෝදනා

ඉදිරිපත් කරනු ලැබ සිටින තැනැත්තාගේ චරිතය, පෙර දිවි පැවැත්ම, වයස, සෞඛ්‍ය, හෝ මානසික තත්ත්වය සලකන විට, එසේ නැත් නම් කර ඇති වරදෙහි ලඝුතාවය හෝ එම වරද කිරීමේ දී උද්ගත වුණු තත්ත්වයෙහි ඇති එම වරද සැහැල්ලු කරන කරුණු ගැන සලකන විට හෝ එම උසාවිය කිසිම දඬුවමක් දීම අයෝග්‍ය යැයි හෝ නාම මාත්‍ර දඬුවමක් හැර වෙන යම් දඬුවමක් කිරීම නුසුදුසු යැයි නොසිතන විටෙක මෙහි පහත පනවා ඇති පරිදි යම් කිසි කොන්දේසියක් උඩ එම වරදකරු නිදහස් කිරීම යෝග්‍යය යන මතයට බැසගත් විට හෝ ඔහු වරදකරු නොකර එම උසාවියට සෑහේ යයි සිතේ නම් . . . ''.

යටත් පිරිසෙයින් දෙවන නඩුව ගැන සලකා බලන විට මෙම චෝදිතයාගේ පෙර දිවි පැවැත්ම ගැන කරුණු මහේස්ත්‍රාත්වරයා වෙත බල පැවත්විය යුතුව තිබුණි. එපමණක් ද නොව මා දැනටමත් පෙන්වා දී ඇති පරිදි මේවා සැහැල්ලු වරද නොවන අතර මෙම මෝටර් රිය සොරකම් කරන ලද්දේ මෙම විත්තිකරුවා බව ඒත්තු ගැනීමට මහේස්ත්‍රාත්තුමා ඉදිරියේ නිසි පරිදි පිළිගත හැකි සාක්ෂි තිබූ නමුත් ඔහු එම සාක්ෂි පිළිගැනීමට සැලකිළිමක් වී නැත. මෙම නඩු 325 වන ඡේදය යටතේ ක්‍රියා කළ යුතු නඩු නොවන බව පරිවාසක නිලධාරියාගේ වාර්තාවෙන් මහේස්ත්‍රාත්වරයාට සළකා ගැනීමට පුළුවන් කම තිබුණු බව කිව හැක. එ බැවින් දණ්ඩ නීති සංග්‍රහයේ 367 වන ඡේදයට අනුව මේ එක් එක් නඩුවක් පිළිබඳ විත්තිකරු වරදකරු කිරීමට මම මෙය ප්‍රස්තාව කර ගනිමි.

දඬුවමක් දීමේදී විනිසකරුවන් විසින් කල්පනාවට ගත යුතු කරුණු මොනවා ද යන්න පෙන්වා දීමට ද මම කැමැත්තෙමි. මේ සඳහා **ඇටර්නි-ජනරාල්වරයා එ. එච්. ඇන්. ද සිල්වා**, 57 න.නී.වා. 121, 121 පිටේ, ඇති නඩුවෙන් කරුණු උපුටා දැක්වීමට මා සූදනම් ය. එම නඩු වාර්තාවෙහි 124 වන පිටේ ගරු බස්නායක වැඩ බලන අග්‍ර විනිශ්චයකාරතුමා (එ තුමා එවකට සිටි පරිදි) මෙසේ කියා තිබේ : '' වරදකරුවෙකුට දඬුවම් පමුණුවන දඬුවමේ තත්ත්වය සැලකීමේ දී එම දඬුවම මහජනතාව පිළිබඳ අංශයෙන් සහ වරදකරුගේ අංශයෙන් යන අංශ දෙකින් ම සළකා බැලිය යුතු ය. බොහෝ විට විනිසකරුවෝ මෙම ප්‍රශ්නය වරදකරුගේ අංශයෙන් පමණක් බැලීමට කැමත්තාහ. සුදුසු දඬුවම තීරණය කිරීමේ දී විනිසකරුවෙකු විසින් වරදකරු කරන ලද වැරදි ක්‍රියාවක ස්වභාවය අනුවම එහි ඇති බරපතල කම ගැන සලකා චෝදිතයාට විරුද්ධව චෝදනා ඉදිරිපත් කරන ලද දණ්ඩ නීති සංග්‍රහයෙහි හෝ වෙනත් ආඥා පණතක පනවා ඇති දඬුවම ගැන ද කල්පනාවට ගත යුතු ය.

(2) විනිසකරුවා විසින් දෙනු ලබන එම දඬුවම නිවර්තක දණ්ඩනයක් ලෙස බල පවත්වා ද යන්න ගැන සලකා එය කොතරම් දුරට ක්‍රියාකාරී වේද යන්න ද සිතා ගත යුතු ය.

(3) චෝදිතයා වරදකරු හැටියට විනිශ්චය වී ඇති අපරාධයෙහි ස්වභාවය ගැන සලකා එ බඳු අපරාධ කෙතරම් තත්ත්වයක සමාජයේ කෙරේ ද යන්න ද ඔහු විසින් සැළකිය යුතු ය.

(4) එ බඳු අපරාධකරුවන් අල්ලා ගැනීමෙහි ඇති දුෂ්කරතාවය ද විනිසකරුගේ අවධානය යොමු විය යුතු කරුණකි. අපරාධකරුවාගේ චරිත ශෝධනය ද වැදගත් කරුණක් ලෙස නිසැකයෙන් ම සලකා ගත හැකි වුවත් එය මා විසින් සඳහන් කරන ලද අනිත් කරුණු වලට වඩා පහතින් ගිණිය හැකි කරුණකි. යම් හෙයකින් මහජන සුභසිද්ධිය හෝ රටෙහි අර්ථ සිද්ධිය (මේ දෙකම එක් දෙයක් ලෙස ගැනේ) අපරාධකරුවාගේ මුලින් පැවති යහපත් චරිතය, කලින් හැසිරීම සහ වයස යන කරුණු වලට වඩා ගරුක තත්ත්වයක තිබෙන අවස්ථාවක ඇත්ත වශයෙන් ම මහජන සුභසිද්ධියට මුල් තැන ලැබිය යුතු ය (මෙහි නොමිමර දමා ඇත්තේ මා විසිනි).

මේ කරුණු වලට පහත සඳහන් කරුණු ද ගෞරව පෙරටුව මට එකතු කළ හැක.

(5) අපරාධයට ගොදුරු වූ තැනැත්තාට සිදු වූ පාඩුවේ තත්ත්වය.

මෙම නඩුවෙහි ඔහුට සිදුවී ඇති පාඩුව පිරිමැසිය නො හැක්කකි. එයට හේතුව මෙ රටට මෝටර් රිය ගෙන්වීම තහනම් කර තිබීම ය. මෙම අපරාධයට ගොදුරු වූ තැනත්තාට මහජන වාහන පරිහරණය කිරීමට සිදු වී නම් ඔහුට අති විශාල අලාභයකට හා අපහසුවකට මුහුණ පාන්නට සිදුවන්නට ඇත.

(6) අපරාධය අසු නොවිණි නම් දමරිකයාට අයත් වන ලාභය.

අද මෙ රටෙහි පවතින මෝටර් රිය පිළිබඳ නිහකම, පරිහරණය කරන ලද මෝටර් රිය වල අධික මිළ සහ මෝටර් රිය වල කොටස් වලට ඇති මහජන ඉල්ලීම යන කරුණු සලකන විට මේ ක්‍රියාවෙන් දමරිකයාට ලැබෙන ලාභය අති විශාල විය හැකි ව තිබිණි.

(7) සොරකම් කරන ලද බඩුවක් කිනම් කර්තව්‍යයක යෙදිය හැකි ද යන්න.

සොරකම් කරන ලද කාර් ගෙවල් බිඳීම්, පැහැරගෙන යාම් ආදී අනික් අපරාධයන්ට යොදවන බව ඉතාම ප්‍රකට කරුණකි.

මේවා සියල්ලම මහේස්ත්‍රාත්වරයා තමාගේ කල්පනාවට ගත යුතු කරුණු වෙති. මෙම නඩු දෙක ගැන කටයුතු කිරීමේදී මහේස්ත්‍රාත්වරයා තමාගේ කාර්‍ය්‍ය නිසි ලෙස ඉටු නො කර ඇති බව පෙනේ. එ බැවින් මේ නඩුවලින් එක් එක් නඩුවකම චෝදිතයා බරපතල වැඩ ඇතිව දෑවුරුදු දෙක බැගින් සිර දඬුවමකට 367 වන ඡෙදය යටතේ මම පමුණුවමි. දෙවන නඩුවේ දඬුවම ගෙවීමට පටන් ගන්නේ පළමුවන නඩුවේ දඬුවම ගෙවී අවසාන වූ පසුව ය. රජයේ ගාස්තුව වශයෙන් ගෙවන ලද මුදල චෝදිතයාට ලැබිය යුතු ය.

මේ නඩු දෙක ගැන කරුණු කීම නැවැත්වීමට පෙර මෙම නඩු දෙක ගෙන්වා පරිශෝධන කිරීම් වශයෙන් කටයුතු කිරීමට මා පෙළඹුණු හේතුව ද සඳහන් කිරීම අවශ්‍යය.

අග්‍ර විනිශ්චයකාරතුමාට ද, අධිකරණ සේවා කොමිසමට ද පිටපත් යැවූ නිර්නාමික පෙත්සමක් ලැබීමෙන් මගේ සැලකිල්ල මෙම නඩු කෙරෙහි යොමු විය. සාමාන්‍යයෙන් එ වැනි පෙත්සම් ඇත්ත වශයෙන් ම මා කියවූ පසු යැවෙන්නේ මාගේ කුණු කුඩයට ය. නමුත් මෙම පෙත්සම කියවූ පසු එහි සඳහන් කර ඇති දූෂණ කරුණු වල යම් කිසි සාරාංශයක් ඇතැයි ද ඒ ගැන සත්‍යය විමසා බැලිය යුතු යයි ද මට හැඟී ගියේ ය.

අවුරුදු බොහෝ ගණනක් තුළ අධිකරණ නිලධාරියෙක් වූ මම දැනට දස අවුරුද්දකට පමණ පෙර පුල්ලේ විනිශ්චයකාරතුමා ද සාමාජිකයෙකුව සිටි, ශ්‍රේෂ්ඨ විනිශ්චයකාරතුමාගේ සභාපතිත්වයෙන් පැවතුණු අපරාධ අධිකරණ කොමිසම ඉදිරියේ කරුණු දැක්වීමට ගියෙමි. එහි දී මහේස්ත්‍රාත් උසාවි සුදුසු පුද්ගලයන්ගේ පරීක්ෂණය සඳහා භාජන කළ යුතු යැයි මා කියේ මහේස්ත්‍රාත්වරුන්ගේ කටයුතු වල වරද සෙවීමේ අදහසින් නොව ඒ අයගේ කාර්‍ය්‍ය නියම ලෙස කිරීමට උදව් දීමේ අදහසිනි. මහේස්ත්‍රාත් උසාවි වල නඩු නිමාවට ගෙන යන ආකාරය ගැන නැඟී එන මහජන අප්‍රසාදයක් ඇති බවත් ඉතාම බරපතල අපරාධ වල දී පවා අපරාධ නඩු විධාන සංග්‍රහයේ 325 වන ඡෙදය භාවිතා කිරීමට නිතර නිතර ආයාසයක් ගන්නා බවත් මට පෙනී ගිය නිසා ය මෙය කෙරෙන්නේ නඩු නිමාවට ගෙන යාම පිළිබඳව සැපයෙන ත්‍රෛමාසික වාර්තාව කෙරේ ඇස් ගැසීමෙනි. මෙම පුරුද්ද නියම ලෙස යුක්තිය විසඳීමට හිතකර නො වේය යන්න මට සිතුණි.

අපේ උසාවි වල සර්වතෝභද්‍ර (Utopian) තත්ත්වයක් වැඩ කටයුතු පිළිබඳව පවතී නම් උසාවි පරීක්ෂණය අනවශ්‍ය වනු ඇත. යුක්තිය ඉටු කිරීමෙහි නිරත පුද්ගලයන් යුක්තිය ඉටු කිරීමේ කටයුතු දියුණු කිරීම තමා පිට පැවරී ඇති යුතුකමක් හැටියට සැලකිය යුතු ය. යුතුකම් ඉටුකිරීම මනා ලෙසත් සත්‍ය ලෙසත් කෙරේ ය යන හැඟීම ඇති වන්නේ එ විට පමණි. මා අපරාධ අධිකරණ කොමිසමට කරුණු දැක් වූ පරිදි මෙම පරීක්ෂණය කළ යුත්තේ දක්ෂ පුද්ගලයෙකු විසිනි. මෙහි දක්ෂ කම නීතියේ විෂය පිළිබඳව ඇති දක්ෂ කම ම නොවේ. මහේස්ත්‍රාත් උසාවි වල ඇත්ත වශයෙන් කෙරෙන්නේ කුමක් ද යන්න සොයා ගැනීමෙහි ඇති

දක්ෂ කම ය. සෑම කෙනෙකුට ම නියම සථානය ඇහිල්ල දික් කොට පෙන්වීමට පුළුවන් කමක් නැතැයි මා මෙහිලා කීවොත් එසේ කීම නිසා මා වරදවා තේරුම් නො ගනීය යනු මම විශ්වාස කරමි.

වරක් යාපනයේ තමාගේ නඩුවාරය පවත්වාගෙන ගිය මෙම උසාවියේ විනිශ්චයකාරතුමෙකුට යාපනයේ දිස්ත්‍රික් උසාවිය පරීක්ෂා කර බැලීමට යයි අග්‍ර විනිශ්චය-කාරතුමාගෙන් ඉල්ලීමක් කෙරිණි. ඒ අනුව යාපනයේ දිස්ත්‍රික් උසාවිය පරීක්ෂණයට භාජන විය. නමුත් අවසානයවකට මෙන් එම විනිශ්චයකාරතුමා විසින් සැපයූ වාර්තාවේ කොපියක් දිස්ත්‍රික් විනිශ්චයකාර-තැනට නො යවන ලදී. එ බඳු දේ සිදු නො විය යුතු ය. ඒ මන්ද? තමාගේ උසාවිය පරීක්ෂණයකට භාජන වූ විට එහි විනිසකරුට එම උසාවියෙහි යුක්තිය විසඳීම දියුණු කළ යුත්තේ කෙබඳු ආකාරයට දැයි දැනගැනීමට අයිතියක් ඇති නිසා ය.

ත්‍රෛමාසික සංඛ්‍යාත වාර්තා ප්‍රයෝජනවත් වන්නේ උසාවියෙහි ඇති කටයුතු වල නියම තත්ත්වය පිළිබිඹු කෙරෙන විටෙක පමණි. නමුත් බොහෝ විට එය එම වාර්තා එ බඳු දේ පැහැදිළි නො කරති. අවුරුදු දෙකකට අධික කාලයක් තුල කිසිම නඩුවක් පිළිබඳව ඇපැල් පෙත්සමක් ඉදිරිපත් නොවූ එක් උසාවියක් ගැන මම දනිමි. ත්‍රෛමාසික වාර්තා දෙස බැලූ ඕනෑම කෙනෙකුට මෙය අනාවරණය විය යුතු ය. ඒ වාර්තා දෙස බැලූ කෙනෙකුට එම මහේස්ත්‍රාත්වරයා සවී සම්පූර්ණ නො වරදින සුළු කෙනෙකු බව හෝ එම මහේස්ත්‍රාත් උසාවියෙහි යම් කිසි මූලික වරදක් ඇති බව හෝ අවබෝධ විය යුතු ය. එම උසාවියෙහි සිදුවී ගෙන යන ක්‍රියා සම්ප්‍රදය කිසිසේත් නො සිදු විය යුතු බව මනා පරීක්ෂණයකින් හෙළිදරව් වීමට ඉඩ තිබිණි.

මා ඉදිරිපිට නඩු දෙකෙහි මෙන් ම සමහර විට බරපතල අපරාධ පිළිබඳ නඩු පවා හෘදය සාක්ෂියට එකහ නො වන ලෙස නිමාවට ගෙන ගොස් ඇති බව ප්‍රකට කරු-නෙකි. හැකිතාක් ඉක්මණින් මේ තත්ත්වය නැතිකර දැමිය යුතු ය.

මෙම නඩුවෙහි පැමිණිල්ල භාරව ක්‍රියා කළ පොලීස් ඉන්ස්පැක්ටර්වරු දෙදෙනාගෙන් මෙම නඩුව ගැන පරිශෝධනයක් ලබා ගැනීමට ඇටෝර්නි-ජනරාල්වරයා ලවා පියවර ගැන්වීමට පරිශ්‍රමයක් නො ගත්තේ මන්ද යනු දැන ගැනීම සඳහා මම ප්‍රශ්න කෙළෙමි. උසාවියෙන් පැවරූ දඩුවම ගැන වාර්තා ඔවුන්ගේ උසස් නිලධාරීන්ට යවන ලද බව ඔවුහු කීහ. නමුත් ඒ කෙසේ වෙතත් මෙම දඩුවම් අප්‍රමාණවත් බව ඔවුන් තමන්ගේ උසස් නිලධාරීන්ට කියා ඇති බවත් පෙනෙන්නට නැත. දිනපතාම පාහේ යම් යම් කරුණු සඳහා උසාවියට පැමිණෙන පොලිස් නිලධාරීන් මහේස්ත්‍රාත්වරයාගේ අප්‍රසාදයට භාජනවීමට කැමත්තක් නැති බව මට තේරුම් ගත හැක. නමුත් මෙ බඳු නඩුවලදී සුදුසු දඩුවමක් ලබා දීමද, ලැබේ දැයි බැලීමද එයින් වන ප්‍රතිඵල ගැන නො සලකා වුව ද, ඔවුන්ගේ යුතුකම වේ. මෙයට හේතුව නුදුරු අතීතයේ අවුරුදු කීපයක් තුල කරන ලද මෝටර් රිය සොරකම් බොහෝ ගණනක් අල්වා ගැනීමට නො හැකිවී ඇති බැවිනි. නඩුවක් ඉක්මණින් නිම කොට සුදුසු දඩුවමක් දීම නො වරදින නිවීර්තනයක් බව ඔවුහු දත යුත්තාහ.

එක වරදට අවුරුදු දෙක බැගින් දඩුවම් නියම කරණ ලදී.

ගරු බස්නායක අග්‍ර විනිශ්චයකාරතුමා සහ ගරු හේරත් විනිශ්චයකාරතුමා ඉදිරිපිට

හන්වැල්ලේ පියරතන ථෙර එ. කණුමලේ ජිනානන්ද ථෙර සහ තවත් අයෙකු*

ශ්‍රේෂ්ඨාධිකරණයේ අංකය: 569/60 (එෆ්)—කුරුණෑගල දිස්ත්‍රික් උසාවිය, අංක: 8852.

විවාද කළ දිනය : මැයි 20 සහ ජුනි 18, 1963.
තීන්දු කළ දිනය : ජුනි 18, 1963.

විහාර දේවාල පණත, 23 වෙනි ඡේදය—අපවත් වූ භික්ෂුවක් විසින් තමා නමින් මිලයට ගත් ඉඩමක්—ඒ භික්ෂුව අයිති විහාරයට එය අයිති විය යුතු යයි ඉල්ලා සිටීම—ඒ ඉල්ලීම සනාථ කිරීමට ඔප්පු කල යුතු කරුණු.

තීන්දුව:— අපවත්වූ භික්ෂුවක් විසින් තමා නමින් මිලයට ගෙන තිබූ ඉඩමක් එම භික්ෂුවගේ ජීවිත කාලයේදී අන්සතු නො කරන හෙයින් එය උන්වහන්සේ අයිති විහාරයට අයිති යයි කියා ඉල්ලීම සනාථ කිරීම හැකි වන්නේ හුදෙක් උන්වහන්සේගේ පුද්ගලික ප්‍රයෝජනයට මිල දී ගත් බව ඔප්පු කිරීමෙන් ය.

නීතිඥවරු:— රාජනීතිඥ එච්. ඩබ්ලිවු. ජයවර්ධන මහතා, අධිනීතිඥ ඩී. ආර්. පී. ගුණතිලක සහ එල්. සී. සෙනෙවිරත්න යන මහතුන් සමග දෙවෙනි චිත්තිකාර-ඇපැල්කරු වෙනුවෙන්.

අධිනීතිඥ සී. ආර්. ගුණරත්න මහතා, අධිනීතිඥ ජී. ජී. මැන්දිස් මහතා සමග පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්.

ගරු බස්නායක අග්‍රවිනිශ්චයකාරතුමා

මෙය බුලුපිටිය විහාරාධිපති කණුමලේ ජිනානන්ද ථෙර විසින් දේවමැදි උඩුකඟ කෝරලේ බුලුපිටියේ පදිංචි ජයවීර මුදියන්සේලාගේ කිරි මුදියන්සේ සහ හන්වැල්ල පන්සලේ හන්වැල්ලේ පියරතන තෙරුන්ට විරුඬව පවරා ඇති නඩුවකි. පැමිණිලිකාර තෙරුන් 1959 මැයි 7 දින දරන සංශෝධිත පැමිණිල්ලේ කියා සිටියේ බුලුපිටිය විහාරය විහාර දේවාල ගම් ආඥ පණතේ 4 (1) වෙනි වගන්තිය බලනොපාන විහාරයක් බවත් 1951 අගෝස්තු මස 24 වෙනි දින කුරුණෑගල දිස්ත්‍රික් උසාවියේ අංක 6582 දරන නඩුවේ තීන්දුවෙන් තමන්ට එහි විහාරාධිපති කම පැවරී ඇති බවත් වේ. මේ නිසා පැමිණිල්ලේ උපලේඛනයේ විස්තර කර ඇති ඉඩම් කැබලි තුන බුලුගහ විහාරයට අයත් බවට තීන්දුවක් ඉල්ලන පැමිණිලිකරු වගඋත්තරකරුවන් එයින් නෙරපන ලෙස ද උසාවියෙන් ඉල්ලා සිටී.

මේ ඉඩම් 1904 ජනවාරි 20 වෙනි දින මිලදී ගෙන ඇත්තේ මඩවල රත්නායක මුදියන්සෙලාගේ රන්හාමි නොතාරිස් තැන විසින් සහතික කරන ලද 19980 (පී1) නොම්මරය දරන ඔප්පුව පිට වේ. මේ ඔප්පුවෙන් රත්මලේ විහාරයේ නැත්තිපලගෙදර සෝනුත්තර ථෙර සහ ඔහුගේ සහෝදරයන් වන මාපා මුදියන්සෙලාගේ මුදලිහාමි, අවුසදහාමි සහ හේතුහාමි යන අය මේ ඉඩම් බුළුපිටිය විහාරයේ නියන්ගොඩ සීලරතන තෙරුන්වහන්සේට රු: 300/- කට විකුණන ලදී.

"ඉහත සඳහන් කෝරලයේ බුලුපිටියේ පිහිටි නැගෙනහිරින් පන්සල්වත්ත මායිම් කොට ද, දකුණට පිල්ලැව සහ රන්මැණිකේගේ කුඹුර ද, බස්නා හිරට පිංකුඹුර සහ බඩවැටිය ද, උතුරට අප්පුහාමිට අයිති හේන ද, මායිම් කොට ඇති ප්‍රමාණයෙන් කුරක්කන් ලාභක වප්සරියේ ප්‍රථමයෙන් පිල්ලාවත්ව තිබී දැනට වත්තක් වන ඉඩම් තුන්පැලක වප්සරියේ යාබද කුඩාවැව කුඹුර අත්හැර වේ."

පැමිණිලිකරු විහාර දේවාල ආඥා පණතේ 23 වෙනි වගන්තිය අනුව පී1 දරන ඔප්පුවෙන් මිලදී ගන්නා ලද මේ ඉඩම් කැබලි බුලුපිටිය විහාරය සතු විය යුතු බව කියා සිටී. 23 වෙනි වගන්තිය මෙසේ ය.

"යම් කිසි භික්ෂුවක් විසින් හුදෙක් තමාගේ පුද්ගලික ප්‍රයෝජනය උදෙසා මිලදී ගන්නා ලද පුද්ගලික දේපල, එම භික්ෂුව විසින් තමාගේ ජීවිත කාලය තුළදී අන්සතු නොකලේ වී නම්, එම දේපල භික්ෂුවට උරුමයෙන් අයිති නො වන දේපලක් නම්, ඒ භික්ෂුව අයිති විහාරයට ඒ දේපල සතු ලෙස සලකනවා ඇත."

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 66 වෙනි කා., 78 වෙනි පිට බලනු.

මේ දේපල දෙවෙනි ඇපැල්කරුගේ ගුරුන් වූ සිලරතන තෙරුන්වහන්සේගේ හුදෙක් පුද්ගලික ප්‍රයෝජනය උදෙසා මිලදී ගත් බවට කිසිදු සාක්ෂියක් නැත. අප විසින් ඉහත සඳහන් කරන ලද වගන්තිය අනුව අයිති-වාසිකමක් මේ නඩුවේදී පැන නැගීමට නම් ඒ දේපල හුදෙක් පුද්ගලික ප්‍රයෝජනය උදෙසා මිය ගිය තෙර මිලදී ගත් බවට සාක්ෂි ඇති විය යුතු හෙයින් ඒ ප්‍රශ්නය මෙහිදී පැනනගින්නේ නැත. පැමිණිලිකරු සිලරතන තෙර මේ දේපල එතුමාගේ හුදෙක් පුද්ගලික ප්‍රයෝ-ජනය උදෙසා මිලදී ගත් බව මේ නඩුවේ දී ඔප්පු කොට නැත. මේ දේපල පූජා කල බවට ද සාක්ෂි නැත. පැමිණිලිකරුට වාසි අන්දමට උගත් දිස්ත්‍රික් නඩුකාර තුමා කර ඇති තීන්දුව සදෙස් තීන්දුවකි. මේ හෙයින් ඇපැලට ඉඩ දෙන අතර පැමිණිල්ල ගාස්තුවට යටත්ව නිෂ්ප්‍රභා කරන ලෙස තීන්දු කර සිටිමු.

හේරත් විනිශ්චයකාරතුමා

මම මේ තීන්දුවට එකඟ වෙමි.

ඇපැලට ඉඩ දෙන ලදී.

පරිවර්තන **ආර්. ඉලියපෙරුම අධිනීතිඥතුමා විසිනි.**

ගරු බස්නායක අ. වි. සහ එච්. ඇන්. ජී. ප්‍රනාඳු වි. ඉදිරිපිට

ආසියා උම්මා සහ තවත් අය එ. මොහම්මදු සයින්*

ග්‍රෙ. අ. නො. 16—මඩකලපු දි. උ. නො. ඇල්. 1344.

විවාද කලේ සහ තීන්දු කලේ : 1961 මාර්තු 17 වන දා.

සිවිල් නඩු විධාන සංග්‍රහයේ 18 වන ඡේදය—යම් පක්ෂයක් විත්තියට එකතු කිරීම—පක්ෂයක් විත්තියට එකතු කිරීමේ හේතු උසාවිය මගින් විස්තර කළ යුතුය යන අවශ්‍යතාවය.

තීන්දුව:— යම් විනිශ්චයකාරයකු විසින් යම් පක්ෂයක් විත්තියට එකතුකිරීමේ නියෝගයක් කරනු ලැබූ විට සිවිල් නඩු විධාන සංග්‍රහයේ 18 (2) වන ඡේදයේ සඳහන් අන්දමට එවැනි නියෝගයක් කිරීමට හේතු වූ සාධක සහ කරුණු විස්තර කළ යුතු බව.

නීතිඥවරු:— රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා සහ සී. ඡන්මුගනායගම් මහතා, පළමුවන සහ දෙවන විත්තිකාර-ඇපැල්කරුවන් වෙනුවෙන්.

සී. රත්නනාදන් මහතා, පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්.

ගරු බස්නායක, අ. වි. තුමා

මොහමඩ් සයින් මරියානව්වි විත්තියට එකතු කරන ලෙස දිස්ත්‍රික් නඩුකාරතුමා විසින් කරන ලද නියෝග-යකට විරුද්ධ ඇපැලකි මේ. මේ නඩුව ආරම්භවූයේ 1957 ජූනි 17 වනද ය. ''අතිරේක විත්තිකාරියක්'' වශයෙන් ඇය එකතු නො කිරීමට හේතු දක්වන ලෙස ඇවෙන දැන්වීමක් නිකුත් කරන මෙන් 1958 අප්‍රෙල් 2 වනද ඒ පැමිණිලිකරුගේ නීතිඥයා ඉල්ලා සිටියේ ය. ඇවෙන දැන්වීමක් නිකුත් කරන ලදුව කීහිපවරක් නැන් කිරීමෙන් පසුව එය ඇයට බාර දෙන ලදී. 1959 ජනවාරි 22 වනදා අන්තිමේදී මේ කාරණය විභාගයට භාජන විය. පක්ෂයක් වශයෙන් ඇය නඩුවට එකතු කිරීම ගැන විරෝධයක් නැති බව මේ දිනයේදී ඇගේ නීතිඥයා උසාවියට දැන්වීය. පළමු වැනි විත්තිකරු සිට පස්වැනි විත්තිකරු දක්වා පෙනී සිටි නීතිඥයා මීට විරුද්ධ විය. උගත් දිස්ත්‍රික් නඩුකාරතැන කිසිම හේතු-වක් නොදක්වා ''ඉල්ලීමට ඉඩ දෙන ලදී. අතිරේක විත්තිකාරියක් ලෙස එකතු කරනු. සංශෝධිත පැමි-ණිල්ල 1959 පෙබරවාරි 24 වනද ඉදිරිපත් කරනු'' යන නියෝගය කළේය. සිවිල් නඩු විධාන සංග්‍රහයේ 18 වැනි ඡේදයේ නියමිත අන්දමට නඩුව විභාග කළ උගත් විනිශ්චයකාරතුමා කටයුතු කර නැති බව ඇපැල්-කරුගේ උගත් නීතිඥතැන පෙන්වාදී ඇත. විත්තියට පක්ෂයක් එකතු කිරීමේ සෑම නියෝගයක් කරන අවස්ථාවකදී ම එවැනි නියෝගයක් කිරීමට හේතු වූ සාධක සහ කරුණු විස්තර කළ යුතු බව, පක්ෂයක් එකතු කිරීමේ බලය උසාවියට පවරණ 18 වැනි ඡේදයේ (2) වැනි අනු ඡේදයේ සඳහන් වෙයි. උගත් විනිශ්චය-කාරතුමා මේ අවශ්‍යතාවය අනුගමණය කර නැත.

ප්‍රශ්නයට භාජනවූ පක්ෂය විත්තියට එකතු කරන ලෙස පැමිණිල්ලෙන් කරන ලද ඉල්ලීම මුල සිටම විභාග කරන ලෙස නියම කරමින් මේ නඩුව පහළ උසාවියට ආපසු යවන අතර අපි උගත් විනිශ්චයකාර-තුමාගේ නියෝගය ඉවත තබමු. නඩුවේ අවසාන තීන්දුව උඩ මේ ඇපැලේ ගාස්තුව රඳා පවතිනු ඇත.

ගරු එච්. ඇන්. ජී. ප්‍රනාඳු වි. තුමා.

මම එකඟවෙමි.

ඉවත තබා ආපසු යවන ලදී.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 66 වෙනි කා., 79 වෙනි පිට බලනු.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා ඉදිරිපිට

දෙන් පියදස එ. සෙනෙවිරත්න (හෝමාගම උප පොලිස් පරීක්ෂක)*

ග්‍රේ: අ: අංකය: 188/1964—දකුණු කොළඹ මහේස්ත්‍රාත් උසාවියේ අංකය: 34737/බී.

වාද කොට නිම්දු කළ දිනය : ජූනි 3, 1964.

කල්දැමීම පිණිස අපරාධ නඩුවක දී කළ ඉල්ලීමක්—දිනයක් ලබා ගැනීම සඳහා පමණක් කථා කිරීමට තමා පත් කළේ යයි නීතිඥතැන කියා සිටීම—මහේස්ත්‍රාත්තුමා ඉල්ලීම ප්‍රතික්ෂේප කිරීම—අවශ්‍ය ලිපි ලේඛන සහ සාක්ෂි කරුවන් නො මැති නිසායයි ඉල්ලීම යළිත් ඉදිරිපත් කිරීම—සාක්ෂිකරුවන්ගේ ලේඛනය ඉදිරිපත් කර නො තිබීම—සාක්ෂි ලේඛනය නො මැති නිසා ඉල්ලීම ප්‍රතික්ෂේප කිරීම—චිත්තිකරු නඩුවිභාගයට සූදානමින් සිටීම—නඩුව කොටසක් අසා පැමිණිලි පක්ෂයට ලේඛනයට ඇතුලත් කල සාක්ෂිකරුවන් කැඳවීමට පහසුවීම පිණිස ඉන්පසු කල්දැමීම. චිත්තිකරුට ඉන් හානියක් සිදු වූයේ ද?

දිනයක් ලබා ගැනීම සඳහා පමණක් තමා පත්කරණ ලදැයි යන හේතුව දක්වමින් අපරාධ නඩුවක නීතිඥයෙක් මහේස්ත්‍රාත් උසාවියෙන් දිනයක් අයැද සිටියේ ය. මේ ඉල්ලීම ප්‍රතික්ෂේප වූ පසු ඔහු නඩුවට අදළ ලිපි ලේඛන සහ චිත්තියේ සාක්ෂිකරුවන් නොමැති බව කියමින් තම ඉල්ලීම නැවත ඉදිරිපත් කෙළේ ය.

මෙම නඩුවෙහි සාක්ෂි ලේඛනයක් ඉදිරිපත් කොට නැතැයි දැනගත් මහේස්ත්‍රාත්තුමා එම ඉල්ලීමේ සැලකිය යුතු සාරයක් නොමැති බව කියමින් දිනයක් දීම ප්‍රතික්ෂේප කෙළේය. එහෙත් චිත්තිකරු තමාම නඩු-විභාගයට සූදානමින් සිටි නිසා නඩුව විභාග වීගෙන යන අතර පැමිණිලි පක්ෂයේ සාක්ෂිකරුවන් තිදෙනෙකු සාක්ෂි දුන් පසු පැමිණිල්ලේ අමුනා තිබූ ලේඛනයේ ඇති සාක්ෂිකරුවකු කැඳවීම පිණිස නඩුව කල් දමා දිනයක් නියම කරන ලදි.

පසුව චිත්තිකරු වරදකරු කරණු ලැබුයෙන් ඔහු ඇපැල් පෙත්සමක් ඉදිරිපත් කෙළේ ය.

තීන්දුව:— (1) මෙම නඩුවෙහි කරුණු අනුව සලකා බලන කල නඩුව කල් දැමීම සඳහා තමා වෙත ඉදිරිපත් කරණ ලද ඉල්ලීම මහේස්ත්‍රාත්වරයා විසින් ප්‍රතික්ෂේප කිරීම යුක්ති සහගත ය.

(2) මහේස්ත්‍රාත්වරයා විසින් නඩුවේ පැමිණිල්ලේ කොටසක් අසා ඉන්පසු වෙන දිනයකට කල්දැමීමෙන් චිත්තිකරුට කිසිම අවාසියක් සිදුවී නැත.

ගරු ශ්‍රී ස්කන්ධරාජා විනිශ්චයකාරතුමා.—" මහේස්ත්‍රාත් උසාවියෙන් දිනයක් ලබා ගැනීම සඳහා පමණක් නීතිඥයකු පත් කිරීම මේ උසාවියට තේරුම් ගත නො හැකි කරුණකි ".

නීතිඥවරු:— ඩී. ආර්. පී. ගුණතිලක මහතා, චිත්තිකාර-ඇපැල්කරු වෙනුවෙන්.
රජයේ අධිනීතිඥ ඩබ්ලිව්. කේ. ප්‍රේමරත්න මහතා, නීතිපති වෙනුවෙන්.

ගරු ශ්‍රී ස්කන්ධරාජා විනිශ්චයතාරතුමා:

මෙහි චිත්තිකරු වරදකරු කිරීම ගැන හෝ දෙන ලද දඩුවම ගැන හෝ මැදහත් වීමට හේතු වන කිසිදු කරුණක් මට නො පෙනේ. නමුත් මෙම උසාවියට කරන ලද යම් යම් කරුණු සැලකිරීම් සම්බන්ධයෙන් සලකන කල්හි යම් කිසි ප්‍රකාශ කීපයක් මා විසින් කළ යුත්තේ යයි මට හැඟේ. ඇපැල්කරු වෙනුවෙන් පෙනී සිටි ගුණතිලක මහතා 9.5.1963 දිනමින් සඳහන් වී ඇති නඩු විභාගයේ කරුණු සම්බන්ධව ඔහුගේ අවධානය යොමු කොට මෙම නඩුව කල් දැමීමට යැයි යෝජනා කෙළේ දකුණු කොළඹ මහේස්ත්‍රාත් උසාවියේ කටයුතු කරන ජ්‍යෙෂ්ඨ නීතිඥවරයෙකු බවත් එහෙත් එම යෝජනාව ප්‍රතික්ෂේප කොට ඇති බවත් සැලකර සිටියේ ය. මෙම නීතිඥවරයා විසින් මහේස්ත්‍රාත්-වරයාට විරුද්ධව යම් යම් නියෝජනයන් ඉදිරිපත් කොට

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 66 වෙනි කා., 94 වෙනි පිට බලනු.

ඇති බවත් ඒ පිළිබඳ ව දැනට මහේස්ත්‍රාත්වරයාට විරුද්ධ ව පරීක්ෂණයක් පවත්වා ගෙන යන බවත් මගේ අවධානයට භාජන කොට කරුණු සැල කර සිටියේ ය.

මෙම නීතිඥවරයාගේ ඉල්ලීමට හේතු වූ පළමු වන කරුණ වූයේ ඔහුට නඩුව බාරදුන්නේ එ දින ම උදෑසන නඩුව සඳහා දිනයක් ලැබීම පිණිස ඉල්ලීමක් කිරීමට පමණය යන්නය. මහේස්ත්‍රාත්වරයා පහත සඳහන් පරිදි නඩු පොතෙහි සටහන් කොට තිබේ: ''මෙම නඩුව කල් දැම්මට අවශ්‍ය මන් දැයි හේතුයුක්ත කරුණක් මා වෙත ඉදිරිපත් නො වූයෙන් මම ඉල්ලීම ප්‍රතික්ෂේප කරමි''. මහේස්ත්‍රාත්වරයාට මෙසේ කිරීමට බලය තිබේ යැයි මම සිතමි. ජ්‍යෙෂ්ඨ නීතිඥවරයෙකු වූ ඉල්ලුම්කරු මහේස්ත්‍රාත් උසාවි වල නඩු පිළිබඳ අවශ්‍ය උපදෙස් විනාඩි කීපයකින් ලබා ගත හැකි බව අවබෝධ කොට ගත යුතු ව තිබිණි. දිනයක් ලබා ගැනීමට ඉල්ලීමක් ඉදිරිපත් කිරීම සඳහා පමණක් මහේස්ත්‍රාත් උසාවියේ නීතිඥවරයෙකු තැබීම කෙරෙන්නේ කෙසේ ද යන්න මෙම උසාවියට තේරුම් ගැනීම උගහට ය. එම ඉල්ලීම මහේස්ත්‍රාත්වරයා විසින් ප්‍රතික්ෂේප කරනු ලැබීමෙන් පසු ව විත්ති පක්ෂයේ ලිය කියවිලි සහ සාක්ෂිකරුවන් සූදානම් නැතැයි වෙන කථාවක් විත්ති පක්ෂයට ආධාර වශයෙන් ගෙන හැර දක් වූ කල නියම වශයෙන් මහේස්ත්‍රාත්වරයා නඩු පොත පරීක්ෂා කොට එම නඩුවෙහි සාක්ෂි ලේඛනයක් අමුණා තිබෙනු දක්නට නැතැයි කීවේය. මෙම ඉල්ලීමෙහි කිසිම සාරයක් ඇතැයි මහේස්ත්‍රාත්වරයාට පෙනී ගොස් නැත. එ බැවින් එම ඉල්ලීම නිවැරදි ලෙස ප්‍රතික්ෂේප කර තිබේ ය යනු මගේ අදහස යි.

මෙම නඩුව එම මහේස්ත්‍රාත්වරයා විසින් අසනු ලැබීමට තමා අකැමති නිසා නීතිඥවරයා මෙම ඉල්ලීම කරන්නට ඇතැ යි ගුණතිලක මහතා තව දුරටත් කරුණු සැල කෙළේ ය. ඉල්ලීමට හේතුව එය නම් අනියම් ක්‍රම වල නිරත නොවී කෙලින් ම ඒ බව ප්‍රකාශ කළ යුතු ව තිබුණේ යැයි කීම මීට දිය හැකි ඉතාම කෙටි පිළිතුර ය.

නමුත් විත්තිකරු මේ නඩුවට තමා ම සූදානම් ව සිටි නිසා නඩු විභාගය කෙරී ගෙන ගියේ ය. අනතුරුව පැමිණිලි පක්ෂයේ සාක්ෂිකරුවන් තුන්දෙනෙකුගේ සාක්ෂි නිම වූ පසු සාක්ෂිකරුවන්ගේ ලේඛනයෙහි වූ තව සාක්ෂිකරුවෙක් කැඳවා ගැනීම සඳහා දිනයක් දී තිබේ. එම සාක්ෂිකරුවාගෙන් ප්‍රකාශ වීමට තිබුණේ විකුණන ලද දියර වර්ගය ආණ්ඩුවේ අරක්කු බව පමණකි.

මේ අනුව පැමිණිලි පක්ෂයත් නඩුවට සූදානම් ව නො සිටි නිසාත් විත්තියෙන් නඩුව කල් දැම්මට යැයි ඉල්ලීමක් කළ විට දිනයක් දිය යුතු ව තිබුණේ යැයි ද මා ඉදිරියේ කරුණු සැළ කිරිණි. පැමිණිලි පක්ෂයේ එක් සාක්ෂිකරුවෙක් නො පැමිණ සිටිය දී ඉතිරි සාක්ෂි පැමිණිල්ල වෙනුවෙන් අසා ඉන් පසු මෙම නඩුවෙහි සිදුවූවාක් මෙන් නඩුව කල් දැමුව හොත් විත්තිකරුට හානියක් වේ යැයි එකඟ වීමට මට හැකි තත්ත්වයක් නැත. මෙම නඩුවෙහි දී විත්තිකරුට කිසිම පාඩුවක් සිදු වී යැයි සිතිය නොහේ. එ පමණක් නොව නඩුව විභාග කරගෙන යාමට සූදානමක් නැතැයි පැමිණිලි පක්ෂය විසින් මහේස්ත්‍රාත්වරයාට කියන ලද බවක් මෙහි නො පෙනේ. එම නිසා පැමිණිලි පක්ෂයේ නඩුවේ විභාග කළ හැකි ඉතිරි කොටස විභාග නො කිරීමට කිසිම හේතුවක් නො තිබුණි.

මෙම උසාවිය ඉදිරියට පත් වූ නඩු විශාල සංඛ්‍යාවක් ගැන සලකන විට දකුණු කොළඹ මහේස්ත්‍රාත් උසාවියේ අවුරුදු ගණනකම සිට නීතිඥ වෘත්තියේ කටයුතු කරන්නන් තමනට වුවමනා හැටියට කටයුතු කර ඇති නිසා බොහෝ අවස්ථාවන්හි ඔවුන්ගේ ඉල්ලීම පිට නඩු නියම හේතුවක් නො මැති ව කල් දමා ඇති හෙයින් නඩුවක් එහි දැමූ පසු අවුරුදු දෙකක් ඇතුළත එය ඇසී ඇත්තේ කලාතුරකින් බව මට මෙහිලා ප්‍රකාශ නො කර සිටිය නො හැක. උදහරණ වශයෙන් දකුණු කොළඹ මහේස්ත්‍රාත් උසාවියේ අංක 22304/එන් සහ අංක 24228/එන් දරණ පරිශෝධන නඩු වල ශ්‍රේෂ්ඨාධිකරණයේ 24.4.1964 දනමින් කර ඇති සටහන දිය හැක. සමහර විට මෙ පමණ දීර්ඝ කාලයක් ඉඩ හැර ඒ බඳු ඉල්ලීමක් උග්‍ර තත්ත්වයක් ඇති වන දෙයක් හැටියට සලකා මහේස්ත්‍රාත්වරයා ප්‍රතික්ෂේප කළ පසු ඔහු අප්‍රසාදයට භාජන වනවා විය හැක.

මෙම නඩුව කල් දැම්මට යැයි කරන ලද ඉල්ලීම නිවැරදි ලෙස මහේස්ත්‍රාත්වරයා ප්‍රතික්ෂේප කර ඇති බව මම නොමසුරුව පිළිගනිමි.

ඇපැල නිෂ්ප්‍රභා කෙරේ.

ගරු සිරිමාන විනිශ්චයකාරතුමා ඉදිරිපිට

මහම්මදු ලෙබ්බේ එ. මාදන (ප්‍රාදේශීය ආදායම් නිලධාරිතුමා, කටුතුවර)*

ශ්‍රේෂ්ඨාධිකරණයේ ඉල්ලීම නො: 545/63—මහනුවර මහේස්ත්‍රාත් උසාවියේ නො: 33916.

විවාද කළ දිනය : 1964 මැයි මස 22 වෙනිද.
තීන්දු කළ දිනය : 1964 ජූනි මස 5 වෙනිද.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 66 වෙනි කා., 93 වෙනි පිට බලනු.

ඉඩම් අත්කර ගැනීමේ ආඥා පනත—38, 40 සහ 42 (2) යන ඡේද—මෙම පනත යටතේ නිලධාරීන්ට පැවරෙන බලය—අනුගමනය කළ යුතු කාර්‍ය්‍ය පරිපාටිය—මෙම ඡේදයන් යටතේ රජයට භාරගත් ඉඩම් වල අයිතිකරුවන්ට, එසේ භාරගැනීමට විරුද්ධව කරුණු පෑමට බලයක් ඇත් ද.

තීන්දුව:— ඉඩම් අත්කර ගැනීමේ ආඥා පනතේ 42 (2) ඡේදය යටතේ පිස්කල් නිලධාරිතැනට එසේ රජයට අයත් කර ගන්නා ඉඩම භාරදීමට යයි නියෝගයක් කරණ ලෙස ඉල්වා මහෙස්ත්‍රාත්වරයාට කරණ ලද ඉල්ලීමක් අනිත් පාර්ශවය ඉදිරිපිට නොමැතිව ඇසිය හැකි ඉල්ලීමක් නිසා ඒ ඉල්ලීමට විරුද්ධව යම් කෙනෙකුට කරුණු දක්වීමට ඉඩ දී නැත.

නීතිඥවරු:—ජෝර්ජ් කෘෂ්ප්පා, වගඋත්තරකාර ඇපැල්කරු වෙනුවෙන්.
ඇස්. සිවරාසා, ආණ්ඩුවේ නීතිඥ – ඉල්ලුම්කාර වගඋත්තරකරු වෙනුවෙන්.

ගරු සිරිමාන විනිශ්චයකාරතුමා :

රජයට අත් කර ගැනීමට සලස්වා තිබුනු ඉඩම් වල බුත්ති භාරදීමට පිස්කල්ට අන කරන මෙන්, උඩුනුවර හා යටිනුවර ප්‍රාදේශීය ආදයම් නිලධාරි ආනඥා මාදෙන මහතා ඉඩම් අත්කර ගැනීමේ ආඥා පනතේ (460 පරිච්ඡේද) 42 (2) දරණ ඡේදය මගින්, මහනුවර මහේස්ත්‍රාත් උසාවියට ඉල්ලීමක් කළේ ය. මේ සම්බන්ධයෙන් ඇපැල් කරුවන්ට යැවූ දැන්වීමටවත් ඔවුනට හිමිකමක් නැතැයි මගේ හැඟීම වුවද, එම දැන්වීම නිසා ඉඩම්වල බුත්තිය භාරදීමට විරුද්ධව කරුණු කියා පෑමට අවසරයක් ඔවුහු ඉල්ලූහ. උගත් මහේස්ත්‍රාත්තුමා ඔවුන්ගේ ඉල්ලීමට ඉඩ නුදුන් හෙයින් ඇපැල්කරුවෝ මහේස්ත්‍රාත්තුමාගේ එම තීරණය පරිශෝධනය කරන මෙන් මෙම උසාවියෙන් ඉල්ලා සිටිති.

42 (2) දරණ ඡේදය මෙසේ කියවේ :—

'' 38 වන ඡේදය යටතේ, යම් කිසි ඉඩමක බුත්තිය භාරගැනීමට අණ කරනු ලබන නිලධාරියෙකුට, තමාට කරන ලද හෝ පසුව කරනු ලැබේ යයි සිතිය හැකි හෝ අවහිරකම් නොහොත් විරුද්ධකම් නිසා එම නියෝගය ඉටු කිරීමට නුපුලුවන් වුවද, නුපුලුවන්වේ යයි සිතේ භයක් ඇති වුවද, ඒ භූමිය පිහිටා තිබෙන අධිකරණ සීමාවට අයත් මහේස්ත්‍රාත් උසාවියට කරන ලද ඉල්ලීමක් පිට, මහ රැජින වෙනුවෙන් ඔහුට එම ඉඩමේ බුත්තිය භාර දෙන මෙන් නියෝගයක් ඔහුට ලබාගත හැක.''

ඉඩම් අත්කර ගැනීමේ නිලධාරියෙකුට හෝ ඔහු විසින් බල පවරා තිබෙන වෙනත් නිලධාරියෙකුට හෝ, අත්කර ගත් ඉඩම් වල බුත්තිය භාර ගැනීමට ගැසට් පත්‍රයේ පලකරන ලද නියෝගයක් මගින් ඇමතිතුමාට අනකළ හැකි යයි 38 වන ඡේදයේ වෙනත් කරුණු සමග සඳහන් වේ. යම් හදිසි තත්ත්වයක් නිසා එම ඉඩම් වල බුත්තිය වහාම භාරගැනීමට අවශ්‍යවූයේ නම්, එම ඉඩම් වල වන්දිය තීරණය කරන්ටත් පෙර, නිලධාරියෙකුට එහි බුත්තිය භාර ගැනීමට නියෝගයක් මේ ඡේදය යටතේ ඇමතිතුමාට පලකළ හැක.

38 වන ඡේදය යටතේ ඉඩමක බුත්තිය භාර ගැනීමට නිලධාරියෙකුට බල පැවරීමේ නියෝගයක් ගැසට් පත්‍රයේ පල කළ විට, එම ඉඩම, කිසි අවහිරයක් නැතිව සම්පූර්ණ හිමිකම රජය සතු වන බව 40 වන ඡේදයේ සඳහන් වේ.

ආඥා පණතෙහි මීට උචිත ඡේදයන් සලකා බලන විට, පොදුජන කාර්‍ය්‍යයන් සඳහා නොපමාව වුවමනා කරන ඉඩම් වහාම රජය සතු කිරීම මෙම ආඥා පණතෙහි අදහස බව පෙනේ. 38 වන ඡේදය යටතේ ''ඉඩමක භුක්තිය භාරගන්ට අන ලැබූ නිලධාරියෙකුට පිස්කල්තැන මගින් ඔහුට බුක්තිය භාරදීමේ නියෝගයක් උසාවියකින් ලබාගැනීමට අයිතිකමක් ඇති බව ඉහත සඳහන් 42 (2) වන ඡේදයෙන් මනා ලෙස පැහැදිලි වේ ''.

ඇපැල්කරු විසින් තර්කය සනාථ කිරීම සඳහා ඉදිරිපත් කරන ලද නඩුවෙන් (ලොකු බන්ඩා එ. කෘෂිකර්මී සේවා භාර සහායකකොමසාරිස් (65 න. නී. වා. 401) මෙම නඩුවෙන් පරතෙරක් ඇති බව පහසුවෙන් පෙන්විය හැක. එම නඩුවේ කෘෂිකර්මීසේවා භාර සහකාර කොමසාරිස්, 1958, නො: 1 දරණ කුඹුරු-පනතේ 3 (බී) යන ඡේදය යටතේ බැහැර කිරීමේ නියෝගය ලබා ගෙන ක්‍රියාවේ යොදවන්ට උත්සාහ කළේ ය. එම ක්‍රියාවේ යෙදවීමක් වුවමනාවූවිට කළයුතු කාර්‍ය්‍ය පරිපාටිය මේ පණතේ 21 වන ඡේදයේ සඳහන් වේ. ඒ අනුව සටහන් කළ රජෝර්තුවක් උසාවියට ඉදිරිපත් කළ යුතුයි. තවද 21 (2) වන ඡේදය යටතේ එම රජෝර්තුවේ සඳහන් අයට උසාවිය මගින් සිතාසි යවා සිතාසියේ සඳහන් දිනවල උසාවියේ පෙනී සිට බැහැර නො කිරීමට හේතු දැක්විය යුතුයි.

උගත් මහේස්ත්‍රාත්තුමාගේ නිගමනය වන ''ඡේදයේ අදහස නම් ආඥා පත්‍රයකට බදු මෙක් පාක්ෂික ඉල්ලීමක්'' යන්න මගේ ද හැඟීම වන්නේය. ප්‍රාදේසීය ආදයම් නිලධාරියාගේ ඉල්ලීමට විරුද්ධව කරුණු පෑම පිණිස ඇපැල්කරුට උසාවියේ පෙනී සිටීමට බලයක් නැත. උගත් මහේස්ත්‍රාත්තුමාගේ නියෝගය පරිශෝධනය කිරීම පිණිස කරන ලද ඉල්ලීම ප්‍රතික්ෂේප කරමි. ගාස්තුද ඇපැල්කරුගෙන් අයවේ.

ඇපැල නිෂ්ප්‍රභා වෙයි.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා ඉදිරිපිට

කරුණාතිලක, (නිකවැරටියේ ගම්කාසභා සභාපති) එ. පුංචිබණ්ඩා*

ශ්‍රේෂ්ඨාධිකරණයේ අංකය: 182/64—කුරුණෑගල මහේස්ත්‍රාත් උසාවියේ අංකය: 24566.

විවාද කළ දිනය: 1964.5.13 සහ 1964.6.4
තීන්දු කළ දිනය: 1964.6.4

අපරාධ නඩු විධාන සංග්‍රහය, 114 වන ඡේදය—මහජන පීඩාව (Public Nuisance) ගම් කාසභා සභාපති විසින් මහජන පීඩා ක්‍රියාවක් නැවැත්වීමට කරණ ලද ඉල්ලීමක්.

වැසිකිලි කැලි-කසල එක්තරා ස්ථානයක දැමීමට ගම්කාසභාව පුරුදුව සිටි නමුත් එසේ වැඩි දුරටත් කරගෙන යෑමට එම ස්ථානයෙහි අසල් වැසියෙක් වූ වගඋත්තරකරු අවහිර කළා යයි ද, ඔහුගේ එම ක්‍රියාව මහජන පීඩාවක් ලෙස සැලකිය හැකි යයි ද කියා එසේ අවහිර කිරීමෙන් වැලැක්වීම පිණිස අපරාධ නඩු විධාන සංග්‍රහයේ 114 වෙනි ඡේදය අනුව නියෝගයක් ලබා ගැනීමට පලාත් පාලන ආයතනයකට අයිතියක් නැත. ඔහු එසේ කරවීම වගඋත්තරකරුවන්ට කරන පීඩාවකි.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා විසින්—"අපරාධ නඩුවිධාන සංග්‍රහයේ 114 වන ඡේදයට අනුව ක්‍රියා කිරීමට අදහස් කර ඇත්තේ ඉතාම හදිසි මහජන පීඩාවක් මතු වූ කලක ය. එම ඡේදයට අනුව දෙනු ලබන නියෝගයක් දින 14 කට අධික කාල සීමාවක් තුළ බලපවත්නේ නැත."

නීතිඥවරු:— ජී. ටී. සමරවික්‍රම මහතා, ඇපැල් පෙත්සම්කරු වෙනුවෙන්.
ආර්. ඇfප්. සෙන්ට් සී. කෝදගොඩ මහතා, වගඋත්තරකරු වෙනුවෙන්.
රජයේ අධිනීතිඥ කොලින් තෝම් මහතා (උසාවියට සහාය දීමට).

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා:

මෙම නඩුවෙහි වගඋත්තරකරු ගම්සභා කොමිටියේ කම්කරුවනට රාත්‍රිකාලයේ එකතු කරන වැසිකිළි කැලි-කසල වැලලීමට බොහෝ කාලයක් භාවිතා කරන ලද භූමිභාගයක එය කිරීමට ඉඩ නො දීමෙන් මහජන පීඩාවක් කරන ලදැයි කියමින් ද, ඒ නයින් ම ඔහු ගම්සභා කොමිටියේ කම්කරුවන්ගේ වැඩ-කටයුතු වලට බාධා කරන ලද අතර ඇහිලි ගසන ලදැයි ද කියමින් නිකවැරටිය ගම්කාසභාවේ සභාපති මහතා අපරාධ නඩු විධාන සංග්‍රහයේ 114 වන ඡේදය යටතේ ඉල්ලීමක් කෙළේය. වැඩිදුරටත් එම ප්‍රදේශයේ ශරීර සෞඛ්‍යයට මෙය අන්තරාකාරී වන කටයුත්තකැයි ද ඔහු කියා සිටියේ ය.

ඉහත සඳහන් 114 වන ඡේදය ඉතාම හදිසි මහජන පීඩාවක් උද්ගත වූ අවස්ථාවක පමණක් ක්‍රියා-වෙහි යෙදවීමට පැනවී ඇති ඡේදයකි. එකී ඡේදය යටතේ දෙන නියෝගයක් දවස් 14 ක කාලසීමාවක් ඉක්මවා බල නොපැවැත්වේ. මෙම නඩුවෙහි මහේස්-ත්‍රාත්වරයා එම ඡේදය යටතේ නියෝගයක් නො දී වගඋත්තරකරුගේ නිවේදනයක් යැවී ය. ඒ අනුව පැමිණි වගඋත්තරකරු මහේස්ත්‍රාත්වරයා විසින් එබඳු නියෝග-යක් නො කිරීමට ඇති හේතුසාධක දැක් වී ය.

වසී 1955 අංක 61 යන සළකුණෙන් ලකුණු කරන ලද සැලැස්මෙහි මේ කියන ලද ඉඩම ම ගම්කාසභා සභාව විසින් අගල් කපන ලද බිම් කොටසක් ලෙස විස්තර කර තිබෙන බව පැහැදිලි වෙයි. නමුත් මේ-නාක් ම එම බිම් කැබැල්ල රජයට අයිති වන අතර ගම්කාසභා සභාවට එය පැවරී නැත. එම ප්‍රශ්නය ගැන මෙහි දී සළකා බැලිය යුතු යයි මම නො සිතමි.

මේ ඉඩමට යාබදව ඇති ඉඩම් කැබලි කොට මිනිසුන් අතර රජය විසින් බෙදා දී ඇති බැවින් ඉහත සඳහන් බිම් කැබල්ල එකී කර්තව්‍ය සඳහා යෙදවීමට ඉඩ දුනහොත් එය මහජන සෞඛ්‍යයට අන්තරායකාරී විය හැක. මීට සැතපුමකට පමණ ඈතින් පිහිටි තවත් ඉඩමක් රජය විසින් ගම්කාසභා සභාවට වැසිකිළි කැලි-කසල වැලලීමට පිරිනමා ඇති නමුත් ගම්කාසභා සභාවේ සභාපතිතුමා එම ඉඩම ගම්කාසභා සභාවට පවරා ගෙන එහි රාත්‍රි කාලයේ එකතු කරන වැසිකිළි කැලි-කසල වැලලීම පිණිස උපයෝගී කර ගැනීමට ගතයුතු යම්කිසි පියවරක් ගෙන නොමැති බව සටහන් කර ගන්නා ලද සාක්ෂි වලින් පෙනී යන්නේ ය.

මා කලින් සඳහන් කලාක් මෙන් ම මෙම බිම් කැබල්ල අගල් කපන බිම් පෙදෙසක් සේ තව දුරටත් පවත්වා ගෙන යාමට ඉඩ හැරීම එම ප්‍රදේශවාසී මහජනතාවගේ සෞඛ්‍යයට අන්තරායකාරී වනු ඇත. කොටින් කිව-හොත් මෙම ඉඩමෙහි ම වැසිකිළි කැලි-කසල වලලා දැමිය යුතු යයි තරයේ කියා සිටීමින් තමන්ම හිරිහැරයක් වී සිටින්නේ ගම්කාසභා සභාවේ සභාපති මහතා ය. මේ නිසා මහේස්ත්‍රාත්වරයාගේ නියෝගය පිළිගනු ලැබේ.

ගාස්තුව වශයෙන් රුපියල් 105/- නියම කොට මේ ඇපැල් පෙත්සම මෙයින් නිෂ්ප්‍රභා කෙරේ.

ඇපැල නිෂ්ප්‍රභා වෙයි.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයේ 66 වෙනි කා., 96 වෙනි පිට බලනු.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා ඉදිරිපිට

අලගන් එ. අප්පුහාමි*

ශ්‍රේ: අ: අංකය: 942-1963—මහේස්ත්‍රාත් උසාවිය, බදුල්ල, අංක: 38450.

විවාද කොට නිහු කළ දිනය : 3 ජූනි, 1964.

දණ්ඩ නීති සංග්‍රහයේ 315 වන ඡේදය—පොරවකින් කැපීම—චෝදිතයා වරදකරු වීම—දඩුවමේ ප්‍රමාණවත්කම—අපරාධ නඩු විධාන සංග්‍රහයේ 335 වන ඡේදය—මේ ඡේදය යටතේ ඇපැලක් ඉදිරිපත් කිරීමට පෙර උසාවියෙන් අවසර ඉල්ලීම—මෙසේ අවසර දීමට හේතුයුක්ති මහේස්ත්‍රාත්වරයා විසින් දිය යුතු ද?

තීන්දුව: (1) අපරාධ නඩු සංවිධාන සංග්‍රහයේ 335 වෙනි ඡේදයට අනුව ඉදිරිපත් කරන ලද ඇපැල් පෙත්සමකට අවසරදීම සුලු දෙයක්යයි සිතා ඊට ඉඩ දීම නුසුදුසුය. එසේ ඉඩ දීමට ඇති හේතු යුක්ති සඳහන් කළ යුතුය.

(2) චිත්තිකරු පොරොවකින් ගැසූ පහර පැමිණිලිකරු වලක්වන්ට උත්සාහ නොකළේ නම්, ඊට වඩා බරපතල තුවාල ඇතිවන්ට ඉඩ තිබූ නිසා මෙබඳු දේ නොකරණ ලෙස දඩුවමක් පැවැරිය යුතුයි.

නීතිඥවරු:— නිමල් සේනානායක මහතා, බාලා තඩරාජා මහතා සමග, චෝදිත-ඇපැල්කරු වෙනුවෙන්.

ඩබ්ලිව්. කේ. ප්‍රේමරත්න මහතා, ඇටෝර්නිජනරාල්තුමා වෙනුවෙන්.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා,

පොරවකින් කැපීමෙන් සිය කැමැත්තෙන් ම පැමිණිලිකරුට හිංසා කරණ ලදැයි චෝදිතයාට විරුද්ධව මේ නඩුවේ චෝදනා ඉදිරිපත් වී තිබේ. මෙය දණ්ඩ නීති සංග්‍රහයේ 315 වන ඡේදය අනුව දඩුවම් දිය හැකි අපරාධයකි. මෙම සිද්ධිය පිළිබඳව මෙම නඩුවේ දී සාක්ෂි දුන් පැමිණිලිකරුගේ සාක්ෂිය වූයේ ඕනෑකමින් ම චෝදිතයා තමා කැපීම පිණිස පහරක් ගැසූ නමුත් එම පහර වැලැක්වීමට තමා උත්සාහ කළත් බාහුවේ පහළ කොටසේ වැදුට එම පහර වැදී තුවාලයක් සිදු වූ බව ය. පොරොව පාවිච්චි කිරීමේ දී ''නෝ මැරියන්'' යයි චෝදිතයා කී බව ද පැමිණිලි කරුගේ සාක්ෂියේ වැඩි දුරටත් සඳහන් විය.

මෙම නඩුවේ පැමිණිල්ල මහේස්ත්‍රාත් උසාවියට ඉදිරිපත් කරණ ලද්දේ එම පැමිණිල්ල කරණු ලැබූ ගම්පති තැන විසින් නඩුවේ දී ගම්පති තැනට යම් කිසි වාඩුවක් ගැනීමට තිබුනු බවක් අදහස් කරණ ලද නමුත් මහේස්ත්‍රාත්වරයා මේ අදහස් කිරීම ඉවත ලා තිබේ.

චෝදිතයා නඩුවෙහි දී කියා සිටියේ පැමිණිලි කරුගේ පියා වන සුප්පයියා මෙහි චෝදිතයා වන තමා කැපීම සඳහා පොරවක් ගෙන ආවිට තමා සුප්පයියා සමග පොරව උදුරා ගැනීමට පොරකද්දී පැමිණිලිකරු පැමිණ අතින් තමාට ගසන ලද පහරක් නිසා පැමිණිලි කරුගේ බාහුවේ මුල් කොටස පොරවේ වැදුනු බවකි. උගත් මහේස්ත්‍රාත්වරයා මේ ප්‍රකාශය ප්‍රතික්ෂේප කර තිබේ. මෙය නිදහසට කී විශ්වාස කළ නොහැකි අද්භූත ප්‍රකාශයක් නිසා මහේස්ත්‍රාත්වරයාට එය ඉවත හෙලීමට සුදුසු තත්ත්වයක් තිබුනු බව මගේ ද මතය වේ.

මෙසේ නිවැරදි ලෙස චෝදිතයා වරදකරු බවට පත් කළ මහේස්ත්‍රාත්වරයා ඔහුට බරපතල වැඩ ඇතුව දෙසතියක සිර දඩුවමක් නියම කළේය. සමහර විට ඔහු මෙය කරන්නට ඇත්තේ පොරොවකින් සිදු කරණ ලද තුවාලයක් අහලක් ගැඹුරු නම් සතියක සිර දඩුවමක් ලැබීමට සුදුසු බවත් එසේ කරණ ලද තුවාලය අහල් දෙකක් ගැඹුරු නම් එයට දෙසතියක සිර දඩුවමක් සුදුසු බවත් කල්පනාවට ගෙන ඒ පියවර අනුව වීමට බැරි නැත.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 66 වෙනි කා.. 108 වෙනි පිට බලනු.

බණ්ඩාරවෙල මහේස්ත්‍රාත් උසාවියේ අංක 30048 සහ ශ්‍රේ. අ. අංක 204 දරණ, වැ 1964, මැයි මස 8 වන දින මෙම උසාවිය ඉදිරියට ආ නඩුව ද මෙම මහේස්ත්‍රාත්වරයාගේ ම තීන්දුවකැ යි මට මතක් කර දෙන ලදී. එහි දී ඉතාම ප්‍රකට ලෙස පෙනුනු මිනීමැරීමට තැත් කිරීමේ නඩු සිය කැමැත්තෙන් සුලු තුවාල කිරීමේ—එයම දණ්ඩනීති සංග්‍රහයේ 314 වන ඡේදයට අනුව දඬුවම් දිය හැකි චෝදනාවක් බවට පෙරළා ඔහු විසින් මාස 1 1/2 ක අප්‍රමාණවත් සිර දඬුවමක් දෙන ලදී. එම තීන්දුව නිෂ්ප්‍රභා කළ මෙම උසාවිය එය නැවතත් ප්‍රාථමික නඩුවිභාගයක් ලෙස අසන හැටියට නියෝග කොට ආපසු යවන ලදී.

මේ වැනි සැහැල්ලු දඬුවම් දීම් තෝරා දිය හැක්කේ මේවා පණවනු ලබන්නේ ඉන් පසු මේ ගැන ඇපැල් පෙත්සම් ඉදිරිපත් නොවේ යයි ද ඒ නිසා මෙම අධිකරණය ඒ ගැන දැන ගැනීමට නො ලැබේ යයි ද මහේස්ත්‍රාත්වරු කල්පනා කරණ නිසා ම යයි සලකාගෙන පමණකි.

මා කලින් සඳහන් කළාක් මෙන් ම චෝදිතයා වරද කරු කිරීම ගැන මට මැදහත් වීමට කිසිම හේතුවක් නො පෙනේ.

අපරාධ නඩුවිධාන සංග්‍රහයේ 335 වන ඡේදයට අනුව මේ බඳු දඬුවමක් පැමිණ වූ විට "එසේ වරදකරු කළ උසාවියේ අවසරයක් නො මැති ව" ඇපැල් පෙත්සමක් ඉදිරිපත් කළ නො හැක. මෙහි දී වැ 1963, සැප්තැම්බර් මස 20 වෙනි දින, ඇපැල් පෙත්සම ඉදිරිපත් කිරීමට කලින් චෝදිතයා ගේ පෙරකදෝරු මහතා ඒ සඳහා අවසර ඉල්ලූ විට මහේස්ත්‍රාත්වරයා පහත සඳහන් පරිදි නියෝග කර තිබේ :—"මීට ඉඩ දෙන ලදී. ඉදිරිපත් කළ විට ඇපැල් පෙත්සම භාරගන්න". මෙයින් පෙනෙන්නේ මහෙස්ත්‍රාත්තුමා ක්‍රියා කර තිබෙන්නේ "යාච්ඤා කරනු—යාච්ඤා කල දෙය ලැබෙයි" යන්න අනුව බවයි. මෙසේ අවසර දීමට ඇති හේතු කිසිවක් ඔහු සඳහන් නොකෙළේය. මහේස්ත්‍රාත්වරයා විසින් ඇපැල් පෙත්සම දක්නට ඇතැයි කියමින් ඇපැල් කරුගේ නීතිවේදියා කරුණු සැලකර සිටියේය. එහෙත් ඇපැල් පෙත්සමක් ඉදිරිපත් කිරීමට අවසර දීමට කලින් මහේස්ත්‍රාත්වරයා එය දුටු බවට සටහන් වූ කිසිවක් නඩු පොතේ නො මැත. අනිත් අතින් සලකා බලන විට "ඉදිරිපත් කළ විට ඇපැල් පෙත්සම පිළිගන්න" යයි සඳහන් ඔහුගේ නියෝගයෙන් පෙනී යන්නේ එය නිකුත් කළ අවස්ථාවේ ඇපැල් පෙත්සම ඉදිරිපත් කර නො තිබුනු බව ය. එ දින දතමින් නඩු පොතේ ලියා ඇති ඊළඟ සටහනින් ද පැහැදිලි වන්නේ ඇපැල් පෙත්සම පසුව ඉදිරිපත් කළ බවකි.

මෙසේ සුලු දෙයක් ලෙස සිතා ඇපැල් පෙත්සම් ඉදිරිපත් කිරීමට ඉඩ දීම නුසුදුසු බව මෙහි ලා පෙන්නා දීමට මම කැමැත්තෙමි. එසේ ඉඩ දීමට ඇති හේතු-යුක්ති ද සඳහන් කළ යුතු ය. නො එසේ නම් මහේස්ත්‍රාත්වරයා විසින් කරණ ලද චෝදිතයා වරදකරු කිරීම ගැන ඔහුට ම විශ්වාසයක් නැති සේ යයි හැඟීමක් කෙනෙකුට ඇති වීමට පුළුවන. නමුත් මෙම නඩුවේ දී චෝදිතයා වරදකරු කිරීම ඉතාම හොඳ හේතු ඇතුව කෙරී තිබෙන බවට මෙම අධිකරණය සම්පූර්ණ සැහීමකට පත් වූ බව කිව යුතු ය.

දැන් ඉතිරි වී ඇත්තේ මෙම නඩුවේ දී තිබෙන දඬුවම ප්‍රමාණවත් ද යන්න මෙම අධිකරණය මගින් කල්පනා කිරීමට ය. පැමිණිලිකරු පහර වැළැක්වීමට උත්සාහ නො ගත්තේ නම් මීට වඩා දරුණු අන්දමින් අවසාන විය හැකි ව තිබුනු ලෙස මෙහි පොරොවක් පාවිච්චි කර තිබීම නිසා මෙයට නැවත මේ බඳු දේ නො කෙරෙණ ලෙස දඬුවමක් පැනවිය යුතු ය යනු මගේ අදහස යි. මෙහි දී දී තිබෙන දඬුවම කිසිසේත් ප්‍රමාණවත් නො වේ. එම නිසා එය මම බරපතල වැඩත් සමග හයමසක සිර දඬුවමක් නියම වන ලෙස මෙසේ වැඩි කරමි.

ඇපැල නිෂ්ප්‍රභා විය.